

# Congress of the United States

Washington, DC 20515

April 3, 2023

## VIA Federal eRulemaking Portal

The Honorable Xavier Becerra  
U.S. Department of Health and Human Services  
200 Independence Avenue SW  
Washington, D.C. 20201

The Honorable Julie Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

The Honorable Janet Yellen  
Secretary  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

RE: Comments on Proposed Rule: Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7236 (February 2, 2023), RIN 0938-AU94, 1210-AC13, 1545-BQ35

Dear Secretary Becerra, Acting Secretary Su, and Secretary Yellen:

We the undersigned Members of Congress write to urge the U.S. Departments of Health and Human Services, Labor, and the Treasury (the Departments) to withdraw the Proposed Rule: *Coverage of Certain Preventive Services Under the Affordable Care Act*, 88 Fed. Reg. 7236 (February 2, 2023), RIN 0938-AU94, 1210-AC13, 1545-BQ35 (Proposed Rule).

In August 2011, the Departments promulgated regulatory requirements under the Patient Protection and Affordable Care Act (ACA) mandating that non-grandfathered health insurance plans, including employer-sponsored insurance coverage, provide for all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures and related counseling, based on Health Resources and Services Administration-supported guidelines (the contraceptive mandate). The contraceptive mandate has led to more than a decade of legal challenges, including several Supreme Court decisions, due to the Obama administration's efforts to impose this mandate on nonprofit and for-profit entities who object to some or all forms of contraceptive coverage based on sincerely held religious beliefs or moral objections.

In 2018, under the Trump administration, the Departments appropriately brought an end to these conflicts by finalizing rules that protect individuals and entities with religious (83 FR 57536) and moral objections (83 FR 57592) to the contraceptive mandate. Both the November 2018 moral

exemption and religious exemption final rules were upheld by the U.S. Supreme Court in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2382 (2020).

As Members of Congress, we have a unique Constitutional interest and oversight role in ensuring regulations governing the ACA comport with the law and Congressional intent, and do not exceed their Congressional mandates.

While appropriately maintaining the religious exemption rule, the Proposed Rule would, however, eliminate the moral exemption rule, which exempts nonprofits and for-profit entities without publicly traded ownership who object based on their moral convictions to providing some or all forms of contraceptive coverage. The Proposed Rule would subject nonprofit organizations, small businesses, and other covered entities to crippling fines unless they violate their fundamental moral convictions.

The Proposed Rule would also establish a new program, financed through reductions in exchange user fees, to pay providers for furnishing contraceptives to individuals who are enrolled in a plan sponsored by an employer who objects to contraception coverage based on a religious belief. This new program lacks any guardrails against funding for Planned Parenthood and the abortion industry, and in bypassing the appropriations process, deprives Congress of the opportunity to establish appropriate protections.

The Proposed Rule is unnecessary, punitive, and contradictory of our nation's fundamental duty to protect the rights of conscience, which in the words of James Madison, is "the most sacred of all property." (James Madison, "Property," 29 Mar. 1792, Papers 14:266—68). We urge you to immediately withdraw it.

## **I. Maintaining the religious exemption rule is legally required.**

We support the Departments' proposal to maintain the religious exemption from the contraceptive mandate. This exemption is critical for religious organizations, such as churches, schools, and universities, as well as small businesses, and others to be able to operate in accordance with their religious beliefs.

This exemption is not subject to the discretion of the agency as a mere policy matter; rather, it is legally required under the Religious Freedom Restoration Act and the First Amendment to the U.S. Constitution, as the Supreme Court has affirmed on numerous occasions. We note, in response to the Departments' request for comment, that health insurance issuers must be allowed to provide coverage to individuals and entities with religious objections to contraceptive coverage, consistent with those beliefs, regardless of whether the issuer itself shares those beliefs. Furthermore, it would violate the religious beliefs of many objecting individuals and entities to involve them in any way in carrying out duties (such as notifying an insurer) as part of an accommodation scheme to provide contraceptive coverage.

For this reason, the Departments' proposed "alternative approach" on which they requested comment, where they would force religious entities' insurers to provide contraceptives for the organization's plan beneficiaries, negates the exemptions by hijacking the religious objectors'

plans. This alternative approach should be rejected and the religious exemptions fully maintained.

## **II. Eliminating the moral exemption rule is wrongheaded, punitive, and lacks justification.**

While we support the Department's continuation of protections for religious objectors, we strongly oppose the proposal to eliminate the exemptions for individuals and entities with sincerely held non-religious moral convictions.

Some secular businesses and organizations object to complying with the contraceptive mandate not based on religious beliefs, but based on moral convictions about human dignity and the sanctity of human life. These convictions are rooted in science and natural reason, without recourse to claims about revealed or religious truth. For example, some secular pro-life organizations object to providing forms of contraceptives, such as emergency contraceptives like Ella, which can cause the destruction of a human being at the embryonic stage of development by preventing or interfering with implantation, and which they view, therefore, as abortifacients, and akin to abortion. It is wrongheaded and punitive for the government to intentionally burden those with sincerely held moral convictions, particularly regarding the sanctity of human life, or to treat such objections as unworthy of protection simply because they may not be predicated on a religious belief.

The Proposed Rule runs counter to the most foundational political traditions of the American people. Congress has reflected these traditions when, for instance, in the Church Amendments, Congress in 1973 protected moral convictions in addition to religious beliefs in the context of health care, especially with regard to objections to abortion and sterilization (42 U.S.C. 300a-7). For every fiscal year since 1998, moreover, the Financial Services and General Government appropriations bill has contained a provision protecting moral objectors to contraceptives in addition to religious objectors. Specifically, this longstanding law prohibits any contracted Federal Employees Health Benefits plan from "subject[ing] any individual to discrimination on the basis that the individual refuses to prescribe or otherwise provide for contraceptives because such activities would be contrary to the individual's religious beliefs *or moral convictions*" (section 726(c) of division E of Public Law 117-328) (emphasis added).

It also cannot be said that only individuals, and not corporations, or other organizations, can have moral convictions. In fact, the Biden administration has encouraged corporations to act on what it considers to be acceptable moral views relating to corporate responsibility that align with its political agenda, such as promoting environmental, social, and corporate governance (ESG). However, when it comes to organizations that disagree with this administration's political agenda on a fundamental issue of conscience and the sanctity of human life, the administration now seeks to revoke protections for organizations that have sincere moral objections and to force them to provide health insurance coverage that reflects the government's values rather than their own.

The Departments fail to provide sufficient justification for elimination of the moral exemption rule, making the Proposed Rule arbitrary and capricious. The Departments state the prior rule “did not give sufficient consideration to women’s significant interests in access to contraceptive services,” particularly low-income women. However, the Departments admit that “few entities make use of the moral exemption at this time,” and that they “do not have any data on how many individuals object to contraceptive coverage based on non-religious moral beliefs.” The failure of the Departments to identify a plausible universe of individuals who stand to benefit from the elimination of the moral exemption rule, much less a single individual or an affected individual’s income level, undercuts any assertions about the stated benefits that would result from the Proposed Rule. In addition, the Departments do not take into account the degree to which affected individuals, particularly in the case of pro-life nonprofit organizations, are likely to share their employer’s moral convictions regarding contraceptives, and so would not benefit from the elimination of the moral exemption rule.

The Departments also fail to consider other ways in which the entities that utilize the moral exemption rule may modify their employment practices in order to continue to operate in accordance with their moral convictions. For instance, such entities could maintain a grandfathered plan or reduce their number of full-time employees in order to be able to not offer health insurance coverage at all. Such possible outcomes of the Proposed Rule would not only fail to increase the availability of contraceptive coverage for women, but also decrease health care coverage and employment opportunities for those affected.

### **III. The Proposed Rule’s exchange user fee schema would financially benefit the abortion industry and, in bypassing the appropriations process, deprive Congress of the opportunity to establish appropriate guardrails.**

The Proposed Rule would establish a new program that diverts ACA exchange user fees to pay for contraceptives for any individual enrolled in a plan that does not cover contraceptives based on an employer’s religious objection to the contraceptives. This program lacks appropriate protections and would financially benefit the abortion industry.

The creation of this program by regulatory fiat, and bypassing the annual appropriations process, deprives Congress of the opportunity to establish appropriate guardrails, such as to apply the Hyde Amendment and to exclude abortion providers like Planned Parenthood from receiving funds under this program. It can be assumed that abortion providers, as they do with Medicaid and Title X funds, will seek to enrich themselves under the proposed program, and may benefit from the additional failure of the Proposed Rule to establish guardrails for fair pricing of contraceptives under this new program. Because money is fungible, the proposed program may indirectly subsidize abortion activities and the general overhead of abortion centers that integrate abortion and family planning activities.

We request a detailed explanation as to why the Departments believe they have the legal authority to establish this program by regulation using exchange user fees, and without an appropriation from Congress. In order to “ensure that such Exchange is self-sustaining,” the ACA authorizes “the Exchange to charge assessments or user fees to participating health


insurance issuers, or to otherwise generate funding, *to support its operations*” (42 U.S.C. 18031) (emphasis added). Because it is the sole Constitutional prerogative of Congress, not of the Departments, to establish Federal programs and to tax and spend, we ask that the Departments justify how the proposed program is connected to supporting the operations of the exchanges. We note that this new program would transfer an estimated \$49.9 million annually from the Federal Government to providers, through user fee adjustments to participating issuers in those exchanges, even though the individuals who stand to benefit from this program are enrolled in employer-sponsored coverage off the exchanges.

We also ask the Departments to analyze the impacts of this new proposed program on exchange user fee rates, exchange operations funded by these fees, exchange plan premium costs, and Federal receipts and outlays. We note that taxpayer funding for ACA exchange plans are linked to exchange plan premium costs, through Federal advanceable, refundable premium tax credits and cost sharing reductions.

#### IV. Conclusion

The Proposed Rule would force individuals and entities to violate their sincerely held moral convictions about human dignity and the sanctity of human life and creates a new program that will divert exchange user fees in a way that will benefit the abortion industry financially. As such, the Departments should promptly withdraw this unnecessary and deeply misguided Proposed Rule.

Sincerely,



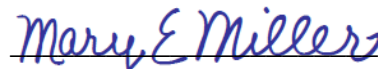
Cindy Hyde-Smith  
United States Senator



Debbie Lesko  
Member of Congress



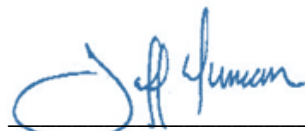
Steve Daines  
United States Senator



Mary E. Miller  
Member of Congress



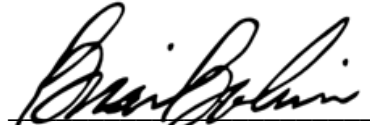
James Lankford  
United States Senator



Jeff Duncan  
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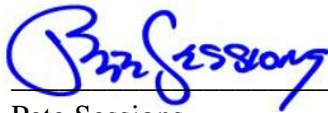
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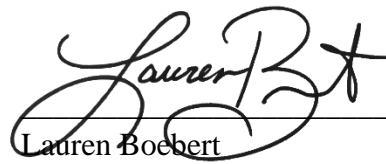
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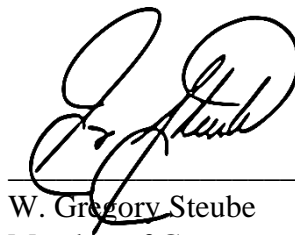
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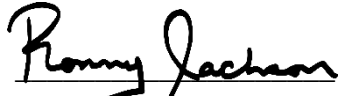
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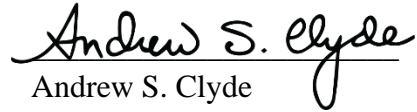
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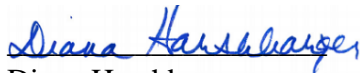
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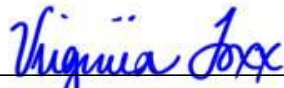
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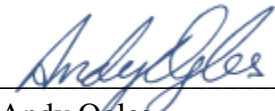
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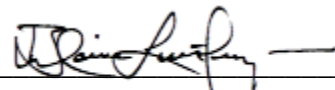
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