



April 03, 2023

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9903-P
P.O. Box 8016
Baltimore, MD 21244-8016

[SUBMITTED ELECTRONICALLY]

To Whom It May Concern:

We write to you today regarding the rule, “Coverage of Certain Preventive Services Under the *Affordable Care Act*,” RIN 0938-AU94, 1210-AC13, and 1545-BQ35 (“Proposed Rule”), proposed by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department (the “Departments”) and ask that this Proposed Rule be immediately rescinded for the reasons listed below. Family Policy Alliance is a network of hundreds of thousands of families, including business owners and employees, from across the country as well as a network of state organizations that seek to preserve First Amendment freedoms for individuals and families.

We are gravely concerned with the Departments’ actions to revoke protections for organizations with non-religious moral objections to the Contraception Mandate under the *Patient Protection and Affordable Care Act* as well as concerns with the newly proposed mechanism to underwrite contraception coverage in order to skirt religious objections to contraception and with the potential sources for “evidence-informed” guidelines. Each of these three concerns in the Proposed Rule is addressed below.

Background

This Proposed Rule seeks to unravel crucial regulations that were put in place by the prior administration to the *Patient Protection and Affordable Care Act*. One particularly egregious mandate within that legislation was the ACA Contraception Mandate, which forced employers to provide contraception insurance, including coverage for the morning-after pill and sterilization, at no cost to the employee. The full list of contraception that must be covered in their entirety included all FDA-approved, cleared, and granted birth control products.¹ This list was unfortunately never made available for public comment or otherwise allowed to be disagreed with by objecting parties.

¹ U.S. Food and Drug Administration. “Birth Control.” 23 Dec. 2022. <https://www.fda.gov/consumers/free-publications-women/birth-control>.



The prior administration sought to protect the religious and moral objections to the Contraception Mandate by proposing and finalizing rules in 2018 to protect employers with either or both religious and moral objections from having to provide contraception to their employees through their insurance.² The rule was both timely and critical, as organizations, including non-religious pro-life organizations, struggled with how to provide health insurance for their employees without undermining their sincerely held moral beliefs. Accommodations and long legal battles ensued shortly after the passage.

Thankfully, the Supreme Court in 2020 ruled in favor of both the moral and religious exemptions in the *Little Sisters Saints Peter and Paul Home v. Pennsylvania et al.* as well as the corresponding rules that the prior administration put in place to protect these employers.³ Additionally, many bills have been introduced in Congress to codify a contraception mandate, but none have been successfully passed.

The purpose of this Proposed Rule is explicit in the text. It states that “ensuring access to contraception at no cost...is a national public health imperative,”⁴ yet there is no proof that this Proposed Rule’s supposed benefits of access will outweigh the immeasurable cost of forcing employers with moral objections to cover objectionable medications and procedures. The Departments admit this by stating they “are unable to develop a precise estimate of the number of eligible individuals who might participate in the individual contraceptive arrangement because the Departments do not know how many entities have claimed an exemption under the November 2018 Religious Exemption final rules.”⁵ Everyone in a company benefits when there is flexibility to ensure that employees have the best health insurance that that employer can provide. If a company feels as if their hands are tied and unable to provide the best plans due to a small objectionable piece of the coverage, then everyone in the company ultimately loses out.

Revoking Moral Exemptions

Many organizations rightfully have deep moral concerns with supplying the morning after pill, sterilizations, or other forms of concerning birth control, and the prior administration protected these organizations as stated above. This Proposed Rule revokes those protections and forces these organizations with moral concerns about any contraception to cover the costs of that contraception through insurance.

While the Departments state they “respect non-religious moral objections” to contraception, this proposed rule completely undermines the moral fabric of many of our employers, even groups that are overtly pro-life groups and serve women, children, and the public. Concern over the life of the preborn child is not just a religious one. Many

² 83 FR 57536 (2017) and 83 FR 57592 (2017)

³ *Little Sisters Saints Peter and Paul Home v. Pennsylvania et al.*, 591 U.S. (2020).

⁴ 88 FR 7236 (2023).

⁵ 88 FR 7236 (2023).

individuals, including medical professionals, recognize the beginning stages of an unborn life with features and DNA separate and unique from the mother carrying the child. In fact, just hours after the egg and sperm unite, there is rapid explosion of cell growth.⁶ These are the beginning stages of a rapidly developing *human* life—not a random growth inside the mother to be discarded.

Organizations that recognize this human life as sacred and worth protecting on moral grounds should not be punished for their beliefs and forced to cover the costs of all forms of birth control. In the 2017 Proposed Rule from the prior administration, the Departments admit that the “FDA includes in the category of ‘contraceptives’ certain drugs and devices that may not only prevent conception (fertilization), but may also prevent implantation of an embryo,” which “many persons and organizations believe are abortifacient—that is, as causing early abortion.”⁷

It is also unclear how many organizations will be affected by this Proposed Rule since data is not collected on the total number of moral exemptions nor is there data on how many women actually want any form of birth control at these organizations. We are concerned that the numbers used in the Proposed Rule are inaccurate and would harm a greater number of employees and employers than intended and request this information be reviewed and more thoroughly vetted prior to any final decisions to the rule being made.

We appreciate your written commitment to keep religious organizations’ exemptions from providing contraception coverage intact. These rights are explicitly protected under the Religious Freedom Restoration Act and the First Amendment and have consistently been upheld in Congress. This is extremely important for health insurance issuers and employers with sincerely held, religious-based concerns to be protected from being forced to provide birth control to their employees, and we ask that those protections continue to be included in the final rule. In no way should these employers be involved in the process of securing contraception coverage for their employees, as some states have attempted to do, and this idea should not be entertained for the Final Rule. This will ensure these organizations can continue to operate without their sincerely held beliefs being encroached upon.

Misapplied User Fees

In the Proposed Rule, employees of exempted religious organizations will now be allowed to utilize a newly created mechanism to reimburse contraception providers in order to work around those religious organizations’ beliefs. This ACA exchange user fee arrangement created under this Proposed Rule in order to cover the costs of

⁶ Charlotte Lozier Institute. “The Voyage of Life: Week 0 to 1.” 5 Mar. 2023. <https://lozierinstitute.org/fetal-development/week-0-to-1/>.

⁷ 82 FR 47792 (2017).

contraception is gravely concerning and wrongly reroutes funding. This was never the original intention for the use of ACA exchange user fees collected by the federal government nor was it authorized or reviewed by Congress.⁸

There are also no protections in place to ensure that organizations such as abortion providers are not allowed to provide these women contraception via this loophole proposed by the Departments. We are very concerned that organizations such as Planned Parenthood, which is a large provider of birth control, would therefore receive federally-controlled funding. Without any reassurances that this is not the case, we would request that this misapplied use of funds be removed from the rule.

“Evidence-Informed” Guidelines

The Proposed Rule also adds in the phrase, “evidence-informed,” by which the United States Preventive Services Task Force (USPSTF), Centers for Disease Control (CDC) and The Health Resources & Services Administration (HRSA) should develop guidelines. Unfortunately, those reading the Proposed Rule are left wondering who is providing the evidence in all circumstances. In the era where many voices on the Right are left out of the decision-making process entirely or universally outnumbered, it is crucial that the Final Rule provide clarity on who will be informing the Departments.

The Proposed Rule does point to one such group that partners and informs HRSA: “In establishing the HRSA-Supported Guidelines, HHS, acting through HRSA, depends on the work of the Women's Preventive Services Initiative (WPSI).”⁹ WPSI was founded in 2016 by the American College of Obstetricians and Gynecologists (ACOG), which holds staunchly pro-abortion views, including “opposing any effort that impedes access to abortion care.”¹⁰ WPSI also promotes an unrealistic sex-gender binary that eventually concludes in excluding women from being serviced and struggles to define what a woman actually is.¹¹

These are some of the many reasons why WPSI leadership is concerning to those with religious, moral and science-based beliefs and leaves organizations with questions on what evidence-informed guidelines will be developed in the future by radical pro-abortion groups. Will WPSI then actively oppose any effort by the religious and moral community when they attempt to bring scientific evidence on the harms of certain

⁸ 42 U.S. Code § 18031.

⁹ 88 FR 7236 (2023).

¹⁰ American college of Obstetricians and Gynecologists. “Abortion Policy.” May 2022.

<https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy>. [Specifically reference statements such as: “Abortion is an essential component of comprehensive, evidence-based health care... ACOG strongly opposes any effort that impedes access to abortion care and interferes in the relationship between a person and their healthcare professional.”]

¹¹ Women’s Preventive Services Initiative. “WPSI Statements.” 2022.

<https://www.womenspreventivehealth.org/wpsi-statements>.

contraception, including abortifacients, being morally unacceptable? We believe they will, as the ACOG policy openly states. While we applaud work to methodically address women’s healthcare, we are concerned that only one side of maternal and prenatal care is being heard by the Departments, and groups, like the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG), are at risk of being ignored. This can only lead to detrimental and harmful effects on women and their children and the policies that are developed from these WPSI guidelines.

The Proposed Rule also makes no recommendations or mention on how to address the adverse health effects of certain contraception, such as risk of developing cancer, by certain contraception products. The National Cancer Institute points to studies that found that oral contraceptives can cause a “10% increased risk for less than 5 years of use, a 60% increased risk with 5–9 years of use, and a doubling of the risk with ten or more years of use.”¹² While WPSI makes clear their recommendations on when to get screened for cervical cancer, there is no mention of the link between contraception and cervical cancer. We would be deeply concerned that groups, like WPSI, would continue to leave out correlations like these to women seeking contraception under the Departments’ Proposed Rule in order to further their agenda.¹³ We recommend ensuring that a wide range of beliefs are included and that the Final Rule shares more on who and what will be included in the development of guidelines.

Conclusion

As you finalize this Rule, we request that those organizations with non-religious moral exemptions be allowed to be exempted, as the Supreme Court has decided. We also request that the ACA exchange user fee arrangement for covering contraception cost be rescinded, especially because there are no guardrails for where this funding can be spent, and that the evidence-informed guidelines be carefully considered to include a wider diversity of thought on this issue. Thank you for taking time to read these above concerns. We trust you will consider these concerns as you finalize this Proposed Rule.

Sincerely,
Ruth Ward
Director, Government Affairs
Family Policy Alliance

¹² National Cancer Institute. “Oral Contraceptives and Cancer Risk.” 22 Feb. 2018.

<https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/oral-contraceptives-fact-sheet>.

¹³ Women’s Preventive Services Initiative. “Cervical Cancer.” 2022.

<https://www.womenspreventivehealth.org/recommendations/cervical-cancer>.