



October 10, 2014

Ms. Marilyn Tavenner
Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-P
P.O. Box 8010
Baltimore, MD 21244-1850
Letter Submitted On-Line at www.regulations.gov

RE: CMS-9940-P: Coverage of Certain Preventive Services Under the Affordable Care Act

Dear Ms. Tavenner:

On behalf of the American College of Nurse-Midwives (ACNM) I am pleased to submit these comments in response to the proposed rule titled “Coverage of Certain Preventive Services Under the Affordable Care Act,” published in the *Federal Register*, on August 27, 2014.¹ ACNM is the national professional association representing Certified Nurse-Midwives (CNMs) and Certified Midwives (CMs), who collectively serve hundreds of thousands of women every year. In addition to maternity care, CNMs and CMs provide a wide range of primary and well women services throughout the lifecycle, including contraceptive care. Our members have a significant interest in ensuring that women have appropriate access to all FDA approved contraceptive methods and services. We express appreciation for the Administration’s expeditious response to the Supreme Court’s recent *Hobby Lobby* decision. We hope you find our comments helpful and look forward to your response in the final rule.

COMMENTS

45 CFR § 147.131 Exemption and accommodation in connection with coverage of preventive health services.

Under the proposed regulation at this subpart, the Departments would extend the exemption to the requirement to cover contraceptive items or services required to be covered under § 147.130(a)(1)(iv) on account of religious objections, to certain closely held for-profit entities. ACNM supports this proposal as a reasonable response to the Supreme Court’s decision. We believe that this mechanism, already in place for non-profit religious organizations, makes it possible for women to receive the specified contraceptive items and services, while simultaneously preserving the constitutional right to the free exercise of religion.

¹ 79 FR 51119

Defining a Closely Held For-Profit Entity

In the discussion under this heading, the Departments request comment on how to define a closely held for-profit entity for purposes of the expanded exemption. In a specific request, the Departments request comment on rationales for “the scope and operation of such accommodations.” While ACNM does not have a position with regard to the specific number of owners or the proportion of the company that must reside with a limited number of owners, we do have concerns about how decisions related to those factors might play out after finalization of this regulation.

We anticipate that if closely held for-profit entities are defined very narrowly, so that only entities with a very small set of owners are able to qualify for the exception, we are likely to see further litigation brought by companies with numbers of owners that exceed the established limit. This may result in situations where it is unclear whether the exception applies during the course of potentially lengthy litigation. Women working for such employers would be left without certainty regarding coverage of contraceptive items and services. We therefore encourage the Departments to define the newly exempt entities in a fashion least likely to give rise to subsequent litigation.

While it is true that a course calculated to avoid future litigation may result in an expansive definition, allowing for entities with many owners to qualify for the exemption, we believe that the Department’s proposal that the objection of the entity “be made in accordance with the entity’s applicable rules of governance,” will act as a functional limiter on the size of the entities that will apply for the exemption.

As the number of owners of an entity grows, those owners will necessarily have an increasingly diverse set of religious beliefs and will be less likely to establish a religious objection to coverage of the specified contraceptive items and services in accordance with the entity’s applicable rules of governance. This reality will operate to reduce the number of entities that might apply for the exemption, without the government having to impose the restriction via regulation.

CONCLUSION

We thank you for the opportunity to comment on this proposed rule. Should you have any questions regarding our comments, please reach out to me directly.

Sincerely,

/JSB/

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