SECULAR COALITION FOR AMERICA

Representing Secular Americans
In Our Nation's Capital

1012 14th Street NW
Suite 205
Washington, D.C. 20005
(202) 299-1091
www.secular.org
info@secular.org

Edwina Rogers
Executive Director

David Niose
President

April 8, 2013

Submitted Electronically

File code CMS-9968-P
Comments on Proposed Rulemaking on "Certain Preventive Services Under the Affordable Care Act"

The Honorable Kathleen Sebelius, Secretary, Department of Health and Human Services
Mr. Steven Miller, Acting Commissioner and Deputy Commissioner for Services and Enforcement, Internal Revenue Service
Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, Department of Labor
Marilyn Tavenner, Acting Administrator, Centers for Medicare and Medicaid Services

Madame Secretary and agency officials:

The Secular Coalition for America, in conjunction with the organizations listed below, appreciates the opportunity to submit comments on the Administration's proposed rules on Coverage of Certain Preventive Services Under the Affordable Care Act.

These proposed rules put forward two principle changes: amending the definition of religious employer and accommodating religious organizations. The contraceptive coverage requirement is intended to serve the compelling public health and gender equity goals of the Affordable Care Act (ACA) and is in no way targeted at religion or religious practices. The Secular Coalition believes these changes put the religious interests of a few employers ahead of immense health and social benefits for all Americans. We believe the best way to accomplish these important goals is to keep the number of employers completely exempted from providing cost-free contraceptive coverage to the smallest number possible through a narrowly-tailored religious employer definition.

In February 2012, the Department of Health and Human Services (HHS) issued final rules adopting a four-prong definition of religious employer for the purpose of exemption from the requirement to cover contraceptive services.[1] The Secular Coalition submitted comments on the interim final rules in support of this definition as an adequate accommodation.

[1] 45 C.F.R. § 147 (2012).

The Cost-Free Contraceptive Coverage Requirement Is Constitutional

The final rule highlighted why providing preventative services free of cost-sharing serves the important governmental interest of enabling women to achieve equal status as healthy and productive members of the job force. The final rule cited ample support including:[2] research showing access to contraception improves the social and economic status of women; contraceptive coverage reduces the number of unintended and potentially unhealthy pregnancies; and contraceptives offer numerous medical benefits to women, including reduced instances of ovarian cancer, endometriosis, ovarian cysts, and iron deficiency anemia, as well as pregnancy prevention for women for whom pregnancy would present a major medical risk. As an important medical treatment, the Secular Coalition is pleased that the proposed rule does not appear to limit the types of contraceptives available to women. The argument for cost-free services was bolstered by supporting information showing women use preventive services more than men, generating significant out-of-pocket expenses for women; that cost sharing can be a significant barrier to effective contraceptive use; and how these unique health care needs and burdens of women were not adequately served under existing health coverage, putting them at a disadvantage compared to their male co-workers.

The final rule's religious employer exemption adequately addressed concerns of balancing contraceptive coverage with the Free Exercise rights of the First Amendment. Without the exemption, mandated contraceptive coverage is still entirely within the constitutional bounds of the First Amendment in accordance with the precedent set by the U.S. Supreme Court that laws that affect religious practice be neutral and generally applicable.[3] The coverage of certain preventive services applies to all employers equally and in no way specifically targets religious conduct. Churches, and other houses of worship, must comply with a myriad of important health and safety laws that protect society. "The very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[4] Additionally, contraceptive coverage does not substantially burden religious exercise and is within the bounds of the Religious Freedom Restoration Act (RFRA).[5] However, the administration chose to exempt religious employers, for whom worship is the essence of their existence.

One of the most difficult challenges faced by the Departments analyzing claims of Free Exercise violations is drawing the line of which employers receive an exemption or accommodation. Free Exercise rights of an organization have historically been recognized for houses of worship, not their affiliates and not private businesses. For-profit corporations are purely creations of the state and have no religious rights. There is longstanding precedent that an employer who seeks to operate in the public sector must do so in a secular manner, complying with all general laws of neutral applicability. The religion of the individuals who run these organizations is irrelevant. They have the right as individuals to their religious beliefs and limited actions of worship, and even to run their business in accordance with their beliefs, until that form of operation that violates the law or the rights of their employees. Similarly, a religiously affiliated organization nonprofit whose actions are motivated by religious belief is not an entity which receives religious rights. These 501(c)(3) organizations also receive official recognition as a creation of the state, unlike churches, which are not required to apply for and obtain recognition from the IRS. The key word is "affiliated," signaling religion is not their primary purpose. While the charitable and educational acts of these

---

[2] 45 C.F.R. § 147 (2012).

[3] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[4] Wisconsin v. Yoder, 406 U.S. 205 at 215(1972).

[5] 42 U.S.C. § 2000bb - 42 U.S.C. § 2000bb-4

organizations are truly commendable, the intent of an accommodation is to strike a proper balance between ensuring the health and safety of society without gravely endangering the continued existence of houses of worship. For these reasons, any definition of an employer eligible to apply for exemption must be limited to houses of worship.

The constitutional limits of the Free Exercise clause and RFRA have been grossly misrepresented by those who continue to claim that the religious employer exemption is inadequate. In their comments on this proposed rule, the United States Conference of Catholic Bishops (USCCB)[6] improperly characterizes the religious rights endowed by the First Amendment as extending beyond belief or actions intertwined with worship, but call every action of every day of living a "Christian life." Even if there is a finding that there is a conflict between the Catholic faith and the obligations imposed by contraceptive coverage, it "is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." [7] In the year since the final rule was released, six of the ten cases filed by houses of worship challenging the rule have been dismissed, with two more with dismissal motions pending. These suits stand for the principle that requiring indirect financial support of a practice from which the employer abstains does not present enough harm to religious rights to survive even the lowest constitutional standard to avoid dismissal. "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."[8] The constitutionality of the current four-prong definition has been upheld and requires no change.

Claims of violated religious liberty are posturing and hold no weight; however there is room for the government to act between inhibiting Free Exercise and Endorsing religion, if the government chooses to create an accommodation. The question presented by the series of contraceptive coverage rules is what is the appropriate balance so important government interests will best be served without the most essential Free Exercise rights being fatally damaged. Taken from the final rule, the administration stated the balance is found between "importance of extending these benefits to as many women as possible" and "religious beliefs are more appropriately taken into account by individuals when making personal health care decisions." This indicated the administration's intent in crafting an exemption was to have coverage denied for the fewest employees possible, except where necessary to protect **employee** religious rights. The Secular Coalition whole heartedly agreed. The best way to accomplish this goal is through a well-crafted, narrowly tailored religious employer exemption.

The Secular Coalition submits two possible approaches to achieve this goal:

1. Maintain the current four-prong definition of religious employer adopted in the final rules to qualify for an exemption, and require meeting only the fourth prong of that same definition to qualify for an accommodation.
2. Alternatively, replace the current definition with the definition from the Social Security Exemption to qualify for an exemption, removing the need for an accommodation.[9]

---

[6] Comments by United States Conference of Catholic Bishops on Notice of Proposed Rulemaking on Preventive Services, File Code No. CMS-9968-P, submitted 3/20/2013. http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf

[7] U.S. v. Lee, 455 U.S. 252, 258 (1982).

[8] U.S. v. Lee at 261

[9] 26 USC §3127

The Suggested Definitions are More Appropriate and Clear than the Proposed Rule

On one point the Secular Coalition agrees with the USCCB. The IRS tax exemption language may not be the best available religious employer exemption. However, the USCCB offers as suggested text, the Church Amendment of 1973, which is even less related as it covers federal grants for family planning, but has nothing to do with employee-employer relations, insurance, or exemptions for religious nonprofits, and it is massively overbroad as it would cover anyone with a moral objection.[10]

An alternative definition is the religious exemption from participation in Social Security Act programs.[11] This exemption directly addresses the issue at hand, when the government passes a law for the health and safety of society that puts additional regulations on employers and how they provide wages and benefits to their employees, to which some employers have a religious objection. This Congressionally approved definition provides an exemption for organizations and their employees where both are members of religious faiths opposed to participation in Social Security Act programs.

The Social Security exemption requires both the employer and the employees to be members of a religious faith, both must be adherent of established tenets or teachings of such sect, and they must file and have approved an application for exemption.[12] Use of this exemption in the contraception coverage context cures the USCCB's complaint that the proposed religious employer definition "is wholly unprecedented in its use as a conscience protection at the federal level." It serves as both the exemption, and the accommodation, also curing the USCCB's complaint that the current exemption is too narrow as "almost exclusively applied to Houses of Worship." All churches and religiously affiliated nonprofits covered by the proposed accommodation could be covered with this single rule.

---

[10] 42 USC §300a-7 (1973).

[11] 26 USC §3127 **Exemption for employers and their employees where both are members of religious faiths opposed to participation in Social Security Act programs**- (a) In general- Notwithstanding any other provision of this chapter (and under regulations prescribed to carry out this section), in any case where— (1) an employer (or, if the employer is a partnership, each partner therein) is a member of a recognized religious sect or division thereof described in section 1402 (g)(1) and an adherent of established tenets or teachings of such sect or division as described in such section, and has filed and had approved under subsection (b) an application (in such form and manner, and with such official, as may be prescribed by such regulations) for an exemption from the taxes imposed by section 3111, and (2) an employee of such employer who is also a member of such a religious sect or division and an adherent of its established tenets or teachings has filed and had approved under subsection (b) an identical application for exemption from the taxes imposed by section 3101, such employer shall be exempt from the taxes imposed by section 3111 with respect to wages paid to each of the employees thereof who meets the requirements of paragraph (2) and each such employee shall be exempt from the taxes imposed by section 3101 with respect to such wages paid to him by such employer. (b) Approval of application- An application for exemption filed by an employer (or a partner) under subsection (a)(1) or by an employee under subsection (a)(2) shall be approved only if— (1) such application contains or is accompanied by the evidence described in section 1402 (g)(1)(A) and a waiver described in section 1402 (g)(1)(B), (2) the Commissioner of Social Security makes the findings (with respect to such sect or division) described in section 1402 (g)(1)(C), (D), and (E), and (3) no benefit or other payment referred to in section 1402 (g)(1)(B) became payable (or, but for section 203 or 222(b) [1] of the Social Security Act, would have become payable) to the individual filing the application at or before the time of such filing.

[12] 26 USC §3127

Any Employer Exemption Imposes the Employer's Religion on Employees

This definition arose from a Supreme Court case where a member of the Amish religion, who employed other members of the Amish religion, claimed that imposition of social security taxes violated his Free Exercise rights and the rights of his employees.[13] The Court found a religious exemption did **not** extend to employers.[14] "Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[15] This same logic applies to the contraception coverage religious employer exemption. The second prong of the original four-prong religious employer exemption ensured employees affected by the exemption shared the religious tenets of their employers. Just as the compelling government interest supporting contraceptive coverage is the health and safety of women, the religious liberty interests of the employees denied coverage is the paramount religious liberty concern.

Allowing employers to make a unilateral decision to be exempted sets a terrible precedent for religious interference in individual choice. The Social Security Exemption ensures the employee's religious beliefs are taken into account when making personal health care decisions. It gives the employee an equal voice in the choice, as was the intention stated in the final rules that "religious beliefs are more appropriately taken into account by individuals when making personal health care decisions."[16]

The Proposed Exemption Change Will Deny Thousands of Women Contraceptive Coverage

With this proposed rule, HHS rescinded three out of four criteria from its definition of "religious employer" thereby broadening the number of exempt organizations and thereby the number of women whose employers are not required to provide cost-free contraceptive services. Not only will 317,751 congregations will be eligible for this exemption,[17] this expanded definition could potentially include the 7% of America's workforce currently employed by charities. As of 2005, more than half of nonprofit employment is in health care or social assistance and approximately 18% are employed in educational services. These percentages reflect over 9.3 million employees. These are fields with professions where women are strongly represented. Over 90% of nurses are women[18] and 74% of private school teachers are women. [19]

The proposed rule points out that certain religious entities may not meet the religious employer definition "if a church runs a parochial school that employs people of different religious faiths." That is exactly the point. An employee for an organization that's main purpose is inculcation of religious values likely shares those values and is therefore not giving up her religious liberty rights. However, a teacher values education and mentoring children, values that should not be subservient to the religious beliefs of her employer at a parochial school any more than a secular private school or public school. A nurse wants to be a nurse to save lives and help heal people, and in some cases

---

[13] U.S. v. Lee, 455 U.S., at 258-261
[14] Id. at 256
[15] Id. at 261
[16] 45 C.F.R. § 147 (2012).
[17] National Center for Charitable Statistics, Quick Facts About Nonprofits. http://nccs.urban.org/statistics/quickfacts.cfm
[18] U.S. Department of Labor, Bureau of Labor and Statistics. http://www.dol.gov/wb/factsheets/Qf-nursing.htm
[19] National Center for Education Statistics. http://nces.ed.gov/fastfacts/display.asp?id=28. "86% of private schools are religiously affiliated." Council for American Private Education. http://www.capenet.org/facts.html

religious affiliated hospitals are the only hospitals to work at where they live.[20] In an already difficult employment climate, we are asking our nurses and teachers to give up their religious liberty and important personal health considerations for employment.

The final rule stressed the "importance of extending these benefits to as many women as possible," but the proposed rule significantly increases the number of women who will be denied access to no-cost contraceptive services. Adopting the Social Security Exemption will avoid a broad sweeping employer policy and ensure these benefits are extended to any employee that wants them, while respecting the Free Exercise rights of the employees and employers who choose not to participate. A return to the four-prong religious employer exemption will at least ensure the number of employees denied this coverage is limited.

The Proposed Rule Leaves the Exemption Open for Abuse

A narrowly tailored exemption ensures genuine religious liberty interests are at stake. A problem solved by the first prong of the current religious employer definition, the Social Security Exemption requires that tenets of the religious sect are at risk by the proposed government action. For example, although the USCCB's claim is that contraceptive coverage violates religious liberty, the bishops' submitted comments never state the tenet which bans contraceptive use, never say how a member of Catholic faith offering access to coverage of contraceptives violates that faith, never explain how that un-cited tenet and the mode of life are inseparable, and give no example as to how the Catholic religious order will be negatively impacted if not exempted. These answers were required by the Supreme Court when evaluating the quality of a claim of encroachment on free exercise of religious beliefs.[21] To sustain a claim of RFRA violation, a substantial burden of religious exercise must be shown. The only burden claim in the currently submitted comments by the USCCB, is the possibility of a slight increase in insurance premiums for accommodated employers, which does not begin to reach the high bar of "substantial."

The Social Security Exemption requirement that a religion be in existence since 1950 with established tenets or teachings expounds the Supreme Court precedent[22] that a long and consistent history of adherence supports a claim that the state's requirement would gravely endanger Free Exercise of religious beliefs. Certain religiously affiliated institutions, that would be covered under this proposed religious employer definition, had a history of providing health insurance coverage for contraception, but recently dropped that coverage amid political controversy.[23] This stands as an illuminating example that employee access to contraception coverage could be burdened or denied as a result of political pressure, not a violation of a longstanding religious belief.

Oversight for the proposed exemption and accommodation are, for all practical purposes, non-existent, while the Social Security Exemption has appropriate oversight through the form filing and approval process. The IRS is limited by law from oversight of religious organizations that qualify as 501(c)(3) organizations, the fourth and proposed to be the only remaining prong of the religious

---

[20] Americans United for the Separation of Church and State, Prescription for Disaster. "18% of hospital beds in the U.S. are in religiously affiliated hospitals." https://www.au.org/church-state/march-2011-church-state/featured/prescription-for-disaster.

[21] Wisconsin, 406 U.S. at 215.

[22] Id. at 219

[23] "Xavier University to halt contraception, sterilization coverage" http://www.catholicnewsagency.com/news/xavier-university-to-halt-contraception-sterilization-coverage/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+catholicnewsagency%2Fdailynews+%28CNA+Daily+News%29&utm_term=daily+news

employer exemption.[24] The proposed accommodation's self-certification measure has no oversight at all. Having no check on qualifying organizations will result in far more barriers and delays to employees receiving contraceptive benefits than necessary.

The Eligibility Requirements for the Accommodation are Vague and Overly Broad

In March 2012, HHS' Advance Notice of Proposed Rulemaking (ANPRM) presented potential alternatives for providing coverage of contraceptive services to employees of nonprofit organizations that have a religious objection to contraceptive coverage. The Secular Coalition continued its support of the four-prong definition of religious employer as an adequate accommodation and opposed any alternatives that elevated the religious liberty of a religiously affiliated organization above the religious liberty rights and important healthcare concerns of individuals. This proposed rule asked for comments on "whether the proposed definition of an eligible organization would allow an appropriate universe of nonprofit religious organizations and institutions of higher education establishing or maintaining or arranging health cover to qualify for an accommodation." The Secular Coalition believes requirements to be eligible for the accommodation and both vague and overly broad. A clear and tested definition, such as the Social Security Exemption, avoids many of the pitfalls of the proposed accommodation. At minimum, the proposed religious employer exemption, being registered with the IRS under the religious 501(c)(3) exemption, should be the criteria of eligibility for an accommodation.

This accommodation is incredibly broad, as the condition that an employer be "organized and operate[] as a nonprofit entity" opens the door not only to all of the almost one million organizations registered as public charities,[25] but because there is no registration requirement, infinitely more. Similarly broad, no precedent has found that all "religious objections" necessitate an accommodation, far from it. Any "religious objection" is such a low standard to meet that it will cast aside important health, safety and equality concerns for the smallest hint of religious inconvenience. While the Supreme Court has steered away from determining what is and isn't religious, a claim for an exemption from a law requires a showing both that the belief is sincere and that the belief prevents the claimant from complying with the law at issue. Additionally, the requirement that the organization "holds itself out as a religious organization" is incredibly vague. Any nonprofit, regardless of its activities, run by a person of faith who believes he or she is doing "God's work" could claim this accommodation. Three broad and vague criteria open this accommodation up to an enormous pool of employers, and therefore will result in increased delays and barriers for employees seeking coverage.

Finally, the possibility of amending the exemption definition was not put forth in the ANPRM. While the ANPRM is an optional step, if that step is taken it lays the boundary lines for what rule possibilities will be considered, allowing for appropriate tailoring of comments by the public to expedite a fair rule making process by the agencies. Proposed rules that go so outside the scope of the ANPRM as to amend prior final rules set a dangerous precedent that will lead to lengthy and overreaching public comments covering every marginally related final rule that could potentially be effected.

Once again, the Secular Coalition and the listed groups appreciate the opportunity to comment on the proposed rule for Certain Preventive Services under the Affordable Care Act. The Secular Coalition supports a narrowly-tailored religious employer exemption that enables access for as

[24] 26 U.S.C. § 7611 (2006).

[25] U.S. Congressional Research Service. An Overview of the Nonprofit and Charitable Sector (R40919; November 17, 2009), by Molly F. Sherlock and Jane G. Gravelle. Accessed: March 12, 2013.

many women as possible to cost-free contraceptive services while protecting the religious rights of employees in making their own healthcare decisions.

For questions or comments, please contact Kelly Damerow at Kelly@secular.org or (202) 299-1091.

Respectfully Submitted,

Secular Coalition for America
American Atheists
American Ethical Union
American Humanist Association
Atheist Alliance of America
CampQueset
Council for Secular Humanism
HUUmanists
Institute for Humanist Studies
Military Association of Atheists and Freethinkers
Secular Student Alliance
Society for Humanistic Judaism