ACOG
THE AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS

Office of the President
James N. Martin, Jr., MD, FACOG
2500 North State Street
Jackson, MS 39216

September 29, 2011

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Room 445-G Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201
Attention: CMS-9992-IFC2

Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: RIN 1210-AB44

CC:PA:LPD:PR, Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044
Attention: REG–120391–10

RE: CMS-9992-IFC2 GROUP HEALTH PLANS AND HEALTH INSURANCE ISSUERS RELATING TO COVERAGE OF PREVENTIVE SERVICES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

On behalf of the American Congress of Obstetricians and Gynecologists (ACOG), representing 56,000 physicians and partners in women's health, I am pleased to offer the below comments on the Interim Final Rules with Request for Comments on Group Health Plan and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act. ACOG fully supports the goals of the Affordable Care Act (ACA) to expand women's access to preventive services with no cost-sharing.

We applaud the Department of Health and Human Services' adoption, under Section 2713 of the ACA, of the Institute of Medicine (IOM)-developed recommendations on services that ought to be covered with no co-pay for women, in addition to the recommendations of the United States Preventive Services Task Force, Bright Futures and the Advisory Committee on Immunization Practices.

ACOG, however, objects to the proposed religious exemption which would deny some women access to contraceptives, a key component in promoting women's optimum health. We urge the Department to clarify in rulemaking that emergency contraception is not an abortifacient, and should not be subject to federal restrictions related to public funding of abortion services.

Contraception is an Essential Component of Women's Preventive Health Care

We fully support the Institute of Medicine's finding that family planning is an essential part of basic preventive health care for women, especially for the two-thirds of American women of reproductive age who wish to avoid or postpone pregnancy. Access to family planning counseling and a full array of family planning services—including permanent contraception—is vital for women's health and well-being. By helping women control the timing, number, and spacing of births, family planning has many benefits for a woman and children she may have in the future. Planned pregnancies—which for most women require contraception— allow women to optimize their own health before pregnancy and childbirth. An unintended pregnancy may have significant implications for a woman's health, sometimes worsening a preexisting health condition such as diabetes, hypertension, or coronary artery disease. Planned pregnancies improve the health of children as well, as adequate birth spacing lowers the risk of low birth weight, preterm birth, and small-for-gestational age. The United States has the highest rate of unintended pregnancy in the developed world; approximately half of all pregnancies are unintended. Unintended pregnancies can also result in tremendous individual and societal consequences including family upheaval, nonattainment of educational goals, and financial burdens.

Employees of Religiously Affiliated Institutions Must Not Be Denied Access to This Care

You propose exempting certain religious employers from the requirement that employer-sponsored health plans must include contraceptive coverage with no co-sharing to employees. We oppose this proposal. In "Access to Women's Health Care Policy," we call for "quality health care appropriate to every woman's needs throughout her life and for assuring that a full array of clinical services be available to women without costly delays or the imposition of cultural, geographic, financial, or legal barriers**"**.[1] Limiting a woman's access to contraception is contrary to the basic tenants of health care access and the goals of the Affordable Care Act.

Title VII and Section 1557 of the ACA Conflict with the Proposed Employer Exemption Coverage

The proposed religious exemption conflicts with the non-discrimination provision of the ACA. Section 1557(a) states that no individual shall on the basis of sex "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." Section 2713 applies to all group health plans and health insurance issuers and says that they "shall . . . provide coverage for and shall not impose any cost sharing requirements for" the women's health services in the HRSA guidelines.

No provision of the ACA provides any indication that Congress intended religious employers to be treated differently with respect to Section 2713. Had Congress intended to exempt religious employers' insurance plans from providing comprehensive health insurance coverage for women, it could have done so. For example, in the case of abortion, Congress did include a refusal provision in the ACA. In Section 1303(b)(4) Congress stated that "[n]o qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions." For HHS to read

into Section 2713 a refusal provision where none was intended exceeds its authority.

Title VII also does not allow religious organizations to discriminate on the basis of race, sex (including pregnancy-related conditions), national origin or religion in the provision of pay or benefits.[2] In 2000, the Equal Employment Opportunity Commission confirmed that an employer's failure to provide insurance coverage for prescription contraceptives, when it covers other prescription drugs, devices, and preventive care, constitutes unlawful sex discrimination under Title VII.[3] The proposed religious exemption directly conflicts with Title VII and Section 1557 by limiting the current rights, remedies, procedures, and legal standards established under Title VII, as expressly prohibited by Section 1557, and by allowing discrimination on the basis of sex in any program or activity receiving federal funds. Employers required to comply with Title VII – i.e. employers with more than fifteen employees – cannot invoke the proposed religious exemption.

Any Exclusion Must be Narrow In Scope, Ensure Full Disclosure to the Employee, and Provide Alternative Ways to Ensure Access to Preventive Health Care

ACOG urges the Department not to create a religious exemption to contraceptive coverage. However, if such a provision is included in the final regulations, it must guarantee the following patient protections.

- Any religious exemption must be as narrow as possible to allow the greatest number of women access to contraception without cost sharing. A rule that would allow millions of women to be denied access to this critical benefit would contradict the goals of the ACA and erode public health needlessly.
- Any exempted plan must provide written notice to potential enrollees prior to enrollment and to enrollees upon enrollment that the plan does not cover contraceptive health services.
- The plan must arrange a third party administrator, to assure enrollees direct access to the services which the plan does not cover.
- Affected enrollees must be allowed to directly pay for contraceptive coverage from the plan.
- The enrollee's cost of purchasing such coverage must not be allowed to exceed the enrollee's pro rata share of the price the coverage would have cost had the employer not invoked a religious exemption.
- Employee premium contributions must be considered payment contraceptive coverage.
- Exempted employers must still be required to cover the cost of contraceptive drugs needed for medical purposes other than prevention of pregnancy, including reducing the risk of ovarian cysts or regulating menses.

Emergency Contraception is Not an Abortifacient

Several groups opposing implementation of Section 2713 in regard to women's preventive health services recommended by the IOM and adopted by the Health Resources and Services Administration (HRSA) claim that emergency contraception acts as an abortifacient. They further assert that coverage with no co-pay of

emergency contraception would be in violation of the Weldon amendment and the ACA's abortion-related and non-preemption provisions. There however is no scientific evidence supporting this claim. As stated in the American College of Obstetricians and Gynecologists' Practice Bulletin on Emergency Contraception,

> "Emergency contraception is sometimes confused with medical abortion (39). However, whereas medical abortion is used to terminate an existing pregnancy, emergency contraception is effective only before a pregnancy is established. Emergency contraception can prevent pregnancy during the 5 or more days between intercourse and implantation of a fertilized egg, but it is ineffective after implantation. Studies of high-dose oral contraceptives indicate that emergency contraception confers no increased risk to an established pregnancy or harm to a developing embryo (40)."[4]

It is clear that coverage of emergency contraception with no cost-sharing is not in violation of any federal abortion-related provisions.

Again, thank you for the opportunity to comment on the proposed Amendment to the Interim Final Regulations on Coverage of Preventive Services. We hope you have found our comments helpful. Should you have any questions, please contact ACOG's Federal Affairs Director, Nevena Minor, at nminor@acog.org or 202-314-2322.

Sincerely,

James N. Martin, Jr., MD, FACOG
President

---

[1] American College of Obstetricians and Gynecologists. "Access to Women's Health Care – Statement of Policy". Amended and Reaffirmed July 2009

[2] The EEOC has determined that it is sex discrimination for a religious organization to deny benefits to women or to pay women less based to reflect a religiously-based belief that men are the head of the household. Equal Employment Opportunity Commission, *Directives Transmittal, Section 12: Religious Discrimination*, No. 915.003, July 22, 2008, nn.46-49 and accompanying text, *available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359492.

[3] U.S. Equal Employment Opportunity Commission, *Decision on Coverage of Contraception* (Dec. 14, 2000), available at http://www.eeoc.gov/policy/docs/decision-contraception.html. This ruling garnered little political opposition and the former EEOC leadership and Attorney General under the Bush Administration publicly supported this interpretation of Title VII as enforceable law. Senate Judiciary Committee U.S. Senator Patrick Leahy (D-VT) Holds Second Day of Confirmation Hearing for Attorney General-Designate John Ashcroft, 2001 WL 39606 (F.D.C.H. Jan. 17, 2001) (when asked by Sen. Maria Cantwell if he would defend the agency's December 2000 contraceptive coverage ruling, Ashcroft responded "I would defend the law and seek to uphold the law".)

[4] Emergency Contraception. Practice Bulletin No. 112. American College of Obstetricians and Gynecologists. Obstet Gynecol 2010;115:1100–9.