Wisconsin Alliance for Women's Health
www.supportwomenshealth.org

September 30, 2011

Secretary Kathleen Sebelius
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

RE: **Comments on CMS–9992–IFC2**, amendments to the interim final regulations implementing the rules for group health plans and health insurance issuers relating to coverage of preventive services under the Patient Protection and Affordable Care Act

Dear Secretary Sebelius:

As Wisconsin's women's health policy leader, we write in response to your request for comments regarding the coverage of preventive services under the Patient Protection and Affordable Care Act (hereinafter ACA).[1] The decision by the Department of Health and Human Services (HHS) requiring health insurers to cover a number of women's preventive health care services, including the full range of FDA-approved contraception, with no out-of-pocket costs, is a huge step forward for fairness and improved health outcomes for women and their families.

Wisconsin has also recently taken great strides towards providing comprehensive reproductive health care and access to contraception. In 2010, we became one of only 28 states to require health insurance plans that cover prescription drugs to include contraception.[2] It is critical that the Federal Government affirms and codifies these strides forward in Wisconsin. Our current Governor included a provision repealing contraceptive equity in the state budget, and though it was removed due to its non-fiscal nature, we expect the repeal to be taken up later this year. At the same time, it is unfortunate that HHS intends to exempt some religious employers from providing contraceptive services, an exception not made in the Wisconsin Contraceptive Equity Law. These comments describe the problems resulting exempting some religious employers from providing contraceptives and oppose the inclusion of this exemption or any expansion of this exemption.

Contraception is Prevention

The Institute of Medicine's report *Clinical Preventive Services for Women: Closing the Gaps* concluded that contraceptive services are a fundamental part of preventive health care for women.[3] The Committee of IOM experts who produced the report conducted a comprehensive review of the evidence and recommended that contraceptive coverage should include the full range of contraception approved by the Food and Drug Administration. The evidence further shows that cost-sharing requirements, like co-payments, make people, especially low-income people, less likely to get health services, including preventive care and prescription drugs. In 2009, 30 percent of sexually active low- and middle-income women reported having put off a gynecology or birth control visit to save money; one-quarter of those who used the contraceptive pill reported saving money by using the method inconsistently.[4] Additionally, research shows that in states that made it easier for low-income women to afford contraception by extending Medicaid family planning coverage to more people, there was a dramatic drop in the incidence of short birth intervals (a year or less between babies) for women in the program.[5] Shorter times between a birth and a subsequent pregnancy make preterm birth and low birth weight more likely, which has serious negative consequences for the babies' health.[6]

[1] Equal Employment Opportunity Commission, *Coverage of Contraception* (Dec. 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html.
[2] National Women's Law Center Health Care Report Card, 2010, http://hrc.nwlc.org/policy-indicators/contraceptive-coverage
[3] Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps (2011).
[4] RAISING WOMEN'S VOICES, CONTRACEPTION IS PREVENTION (last Sept. 28, 2011), *available at* http://lsrj.org/documents/11_Women%20of%20Color.pdf.
[5] Id.
[6] Id.

P.O. Box 1726, Madison, WI 53701-1726 608-251-0139 toll free: 866-399-9294 fax: 608-256-3004 info@wiawh.org

Even before the IOM reached this conclusion, there was already a strong public health consensus that contraception is an essential tool in preventing bad health outcomes for women and children. The Centers for Disease Control cites family planning as one of the top 10 public health achievements of the 20th century, noting that access to contraceptive services and supplies is responsible for expanding intervals between births, "contribut[ing] to the better health of infants, children and women." [7]

For all of these reasons, we strongly support the inclusion of comprehensive contraceptive services in the Health Resources and Services Administration Guidelines for women's preventive services.

No Woman Should Be Denied Contraceptive Coverage

In light of the strong medical and public health consensus that contraceptive services are a critical part of women's preventive health care, there is a compelling government interest in ensuring that no woman seeking contraceptive care will be denied coverage for these important health services. **The preventive care provision of the ACA was created to eliminate financial barriers to getting proven preventive care, but by offering an exemption from the contraceptive coverage requirements for religious employers, the Department of Health & Human Services (HHS) would undermine that goal.** The proposed exemption would perpetuate, for some women, the unacceptable status quo in which economic obstacles stand in the way of a woman's ability to get the services and care she needs to preserve her health, have healthy pregnancies and have healthy babies. It will potentially leave some women without insurance coverage for contraceptive care and without the means to get it. [8]

The proposal to exempt religious employers from this coverage requirement was described in amendments to the Interim Final Rule (IFR) as an attempt to balance women's preventive care needs with the conscience concerns of religious institutions. This approach to balancing needs, however, undercuts the intention of the ACA, which is "to provide affordable, quality health care for *all* Americans," (emphasis added). [9] The proposed exemption would have real life consequences for the health of women and babies, denying them the health benefits that the ACA guarantees to those who will not be excluded from the contraceptive coverage requirement. In addition, the addition of an exemption for religious employers conflicts with specific provisions of the ACA, discussed below.

In the interests of maintaining support for both the overarching goals and the specific protections afforded by the ACA, and because of the government's compelling interest in ensuring that no woman will be denied contraceptive coverage, we urge you to remove the proposed exemption that would allow religious employers to deny their employees access to these critical health care services.

Proposed Exemption Conflicts With Specific Provisions of the ACA

First, there is no explicit authority in the ACA allowing the Secretary to limit the scope of the Women's Health Amendment. Second, §1554 of the ACA, entitled Access to Therapies, states that the "Secretary of Health and Human Services shall not promulgate any regulation that … (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care or (2) impedes timely access to health care services. The IOM found that contraceptive services are "appropriate medical care" for women of childbearing age on numerous grounds.[10] The exemption for religious organizations creates an unreasonable barrier for women seeking appropriate medical care by requiring those who work for employers invoking the exemption to bear the substantial costs of contraceptive counseling and services.

Lastly, the religious exemption also constitutes impermissible sex discrimination. Section 1557(a) of the ACA prohibits sex discrimination, and §1557(b) explicitly states that the Act does not "invalidate or limit" the protection afforded to individuals under Title VII. As the Equal Employment Opportunity Commission explained, pursuant to the Pregnancy

[7] Achievements in Public Health, 1900-1999: Family Planning, Morbidity and Mortality Weekly Report, Dec. 02, 1999, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm.
[8] Adam Sonfield, Delineating the Obligations that Come with Conscientious Refusal: A Question of Balance, 12 Guttmacher Policy Review 3 (2009), available at http://www.guttmacher.org/pubs/gpr/12/3/gpr120306.pdf.
[9] H.R. 3962, 111th Cong. (2009).
[10] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 89-91 (July 19, 2011)

Discrimination Act,[11] employers who provide insurance coverage for other preventive health services but do not provide coverage for contraceptives engage in sex discrimination in violation of Title VII.[12] The religious exemption therefore serves to invalidly limit the current protections afforded by Title VII for those employees working for employers who are required to comply with Title VII—those with fifteen or more employees.

A More Narrowly Drawn Exemption Could Limit the Negative Effects On Women

The proposed rule states that the Department has created this exemption in an effort "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." [13] It defines a religious employer as one who has

(1) the inculcation of religious values as its purpose;
(2) primarily employs persons who share its religious tenets;
(3) primarily serves persons who share its religious tenets:
(4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the code [14]

This language does not, however, adequately narrow the pool of employees who would be affected and would potentially deny contraceptive coverage to women who are non-ministerial employees and do not share the same religious beliefs as their religious employer. If HHS decides to preserve an exemption from the contraceptive coverage requirement for religious institutions that oppose contraceptive use, it must draw a more narrow exemption that affects only individuals who share the institution's position that contraceptive use violates their religious beliefs. Women who may hold a different view toward contraception than the exempted employers -- such as an employee in a secretarial or janitorial position at a religious institution, or the spouse or dependent of a ministerial employee, would be denied contraceptive coverage by the religious exemption, as currently drawn. This is an unacceptable violation of the promise of access to quality, affordable health care embodied in the ACA.

We recommend that if the Department plans to maintain a religious employer exemption, it should incorporate additional language to the final regulatory language at Section 147.130 Coverage of Preventive Health Services to read as follows:

> (a)(1)(iv)(A)) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines [15] **for those individuals employed *specifically* for ministerial duties.**

This language would apply only to those entities that already meet the Department's four-part test for qualifying as a religious employer.

This change would narrow the impact of the exemption by limiting the option of excluding contraceptive coverage to health insurance for those individuals employed *specifically* for ministerial duties. The government's duty to protect its compelling interest in providing contraceptive benefits without cost sharing makes this additional language critical. By narrowing the exemption, the Department could achieve its stated goal of providing for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions, while also upholding its

[11] 42 U.S.C. §2000e(k).

[12] Equal Employment Opportunity Commission, *Coverage of Contraception* (Dec. 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html.

[13] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 149, 46621

[14] *Id.*

[15] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 149, 46621

commitment to ensure that women have affordable access to proven preventive health services, including contraceptive care.

Employees Must Be Provided With Adequate Notice and An Affordable Coverage Alternative

The proposed exemption fails to require religious employers who invoke it to notify potential employees of the employer's decision to deny this coverage to its employees. If the Department retains any such exemption, we urge that it add a requirement to ensure that the denial of coverage be made transparent to the appropriate parties by providing full disclosure. [16] We recommend the inclusion of the following written notice requirement:

> *Every religious employer that invokes the exemption provided under this section shall provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons.* [17]

The inclusion of the written notice requirement is consistent with the states that allow certain employers and insurers to refuse to provide contraceptive coverage. Of the 20 states that do so, fourteen of them require a notification to the potential employee. [18]

Finally, should the Department retain a religious employer exemption, we urge that it adopt the model established in New York State's Women's Health and Wellness Act of providing affected employees (1) an option to obtain contraceptive coverage through an insurance rider, with the cost of the base insurance plan plus the rider being comparable to what they would pay for an insurance plan that included these services and (2) notice of this option at the time of plan enrollment.[19] This will ensure that employees who do not share the opposition to contraceptive use of the institution for which they work have health insurance coverage available that meets their own needs as well as those of their family members.

From the very start of this administration's campaign to reform the U.S. health care system and improve access to quality, affordable health care, women have been among the strongest supporters of this policy. We know the tough decisions that families with tight budgets have to make in difficult economic times. We know the impossible choices mothers face when weighing the urgent demand of a past due rental payment against the important, but less immediately pressing, preventive health care needs with their associated co-payments. That's why public opinion research shows, again and again, that women overwhelmingly support requiring coverage of contraception, including more than three-quarters of Catholic women. It's why a national survey of voters conducted just last month showed that telling women about this provision of the ACA increased favorable views toward the law substantially. [20]

Women bear the most intimate and immediate costs of reduced access to contraception and we know how significantly the requirement that insurers cover contraceptive care without any additional charges can improve the health and economic well-being of our families. We urge the Department not to deny this important benefit of the ACA to any woman, as you would by exempting religious employers from the contraceptive coverage requirement. Make sure that the promise of the ACA will be real for all women.

Sincerely,

Sara Finger

Sara Finger
Executive Director

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[16] Adam Sonfield, Delineating the Obligations that Come with Conscientious Refusal: A Question of Balance, 12 Guttmacher Policy Review 3 (2009), *available at* http://www.guttmacher.org/pubs/gpr/12/3/gpr120306.pdf.
[17] A.B. 39 (Ca. 1998).
[18] GUTTMACHER INSTITUTE, INSURANCE COVERAGE OF CONTRACEPTIVES (2011), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.
[19] Circular Letter No. 1, Ch. 554 of the Laws of 2002 (2003), *available at* http://www.ins.state.ny.us/circltr/2003/cl03_01.htm.
[20] LAKE RESEARCH PARTNERS, FINDINGS FROM A SURVEY OF LIKELY VOTERS NATIONWIDE, (Celinda Lake et al eds., 2011).