

Administrator Seema Verma
Department of Health and Human Services
Centers for Medicare and Medicaid Services
Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development
Attn: CMS-10653, Room C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

January 8, 2018

Re: CMS-10653 *submitted electronically at www.regulations.gov*

Dear Administrator Verma,

The National Women's Law Center (the "Center") is writing in response to the notice of Agency Information Collection (AIC) regarding Coverage of Certain Preventive Services Under the Affordable Care Act.¹ Since 1972, the Center has worked to protect and advance the progress of women and their families in core aspects of their lives, including employment, income security, education, and reproductive rights and health, with an emphasis on the needs of low-income women and those who face multiple and intersecting forms of discrimination. The Center has long worked to ensure that health care and health insurance meet women's needs, and that all people have equal access to a full range of health care regardless of income, age, race, sex, sexual orientation, gender identity, health status, geographic location, or type of insurance coverage. This includes affordable and seamless coverage of contraception.

The Departments of Health and Human Services, Labor, and Treasury (the Departments) released Interim Final Rules (IFRs) on October 6, 2017 effectively eliminating the guarantee of birth control coverage under the Patient Protection and Affordable Care Act (ACA), by greatly expanding the existing religious exemption to virtually any employer for religious or moral reasons and making the existing accommodation optional. The IFRs precipitated this AIC. However, the Departments need not go forward with the information collection as outlined in the AIC because the IFRs which precipitated it cannot be enforced. The IFRs are unconstitutional and illegal, violating various provisions of the U.S. Constitution and federal

¹ Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80 Fed. Reg. 51,843 (Nov. 8, 2017).

laws.² Numerous lawsuits were brought against the IFRs, including one brought by the Center, and the IFRs are currently subject to two nationwide preliminary injunctions.³

As a result, the IFRs cannot be enforced and the prior rules remain in effect.⁴ The prior rules create an exemption for churches and other houses of worship, and an accommodation for certain closely-held companies and non-profit entities that allows them to opt out of providing the birth control benefit, but ensures that women will continue to have coverage of birth control without cost-sharing from their regular insurance company. The Departments must enforce these prior rules, including ensuring that women have seamless coverage of birth control without cost-sharing through the accommodation when an eligible entity uses it.

The Center reiterates its opposition to the IFRs which precipitated this notice of information collection. By allowing employers, universities, and insurance companies to deny women birth control coverage guaranteed under the ACA, the expanded exemptions envisioned by the IFRs will harm women's health, equality, and economic security,⁵ reinstating the very barriers that Congress intended to address with the ACA. The IFRs are illegal and discriminatory. At no point should they ever go into effect, and therefore no new information collection should ever be necessary. The Center unequivocally calls on the Departments to rescind the IFRs in their entirety immediately.

Sincerely,



Gretchen Borchelt
Vice President, Reproductive Rights and Health
National Women's Law Center

² The IFRs violate numerous federal laws and constitutional provisions, including the Administrative Procedure Act, the Establishment Clause of the First Amendment to the U.S. Constitution, the Due Process Clause of the Fifth Amendment to the U.S. Constitution including equal protection guarantees and the right to liberty, and the ACA's non-discrimination provision. *See* Brief for Plaintiff, *Shiaref v. Hargan*, No. 3:17-cv-00817-JD (N.D. Ind. filed Oct. 31, 2017).

³ *Pennsylvania v. Trump et al.*, No. 17-4540 (E.D. Penn. Dec. 15, 2017) (order granting preliminary injunction), and *California et al., v. Health and Human Services et al.*, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017) (order granting preliminary injunction).

⁴ "The Court notes that simply enjoining Defendants from enforcing the 2017 IFRs, without requiring them to proceed under the prior regime pending resolution of the merits, would result in a problematic regulatory vacuum, in which the rights of both women seeking cost-free contraceptive coverage and employers seeking religious exemption or accommodation would be uncertain. At oral argument, counsel for Defendants confirmed that they do not advocate for such a vacuum in the event the Court grants a preliminary injunction." (internal citations omitted) *California et al., v. Health and Human Services et al.*, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017) (order granting preliminary injunction).

⁵ This comment uses the term "women" because women are targeted by the IFRs. We recognize, however, that the denial of reproductive health care and insurance coverage for such care also affects people who do not identify as women, including some gender non-conforming people and some transgender men.