

BPCLC

New York State
Bipartisan Pro-Choice Legislative Caucus

June 19, 2012

Submitted electronically

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

Re: ANPRM: Certain Preventive Services Under the Affordable Care Act, CMS-9968-ANPRM,
Docket ID: CMS-2012-0031

Dear Centers for Medicare & Medicaid Services,

As the Co-Chairs of the New York State Bipartisan Pro-Choice Legislative Caucus (BPCLC), we submit these comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) on “Certain Preventive Services Under the Affordable Care Act,” published in the Federal Register on March 21, 2012. The BPCLC is comprised of 79 members of both the New York State Senate and Assembly. Its mission is to protect access to quality reproductive health services, respond to potential infringements on legal rights to reproductive healthcare in the State of New York, and provide a voice for state legislators in policy debates at both the state and national level.

The ANPRM announces the intention of the Departments of Labor, the Treasury, and Health and Human Services to provide an accommodation to non-profit religious organizations with religious objections to covering contraceptive services without cost sharing. Provision of this coverage is required under the Affordable Care Act (ACA), and the Departments’ final regulations of February 15, 2012 did not exempt these organizations from providing such coverage (77 FR 8725). The ANPRM also maintains the provision of contraceptive coverage without cost sharing to individuals who receive coverage through non-exempt religious organizations with religious objections to contraceptive coverage.

As detailed in our comments below, the BPCLC strongly opposes any expansion of the religious employer exemption that was adopted in the final regulations (77 FR 8725). If the Departments move forward with a new accommodation for religious organizations, it must be limited and structured in a seamless way that does not unfairly disadvantage those individuals subject to it or harm their health. No more women or their families should lose out on the health benefits of accessing no-cost contraception.

BPCLC, Room 905, Legislative Office Building, Albany NY 12247

1. Opposition to Expansion of the Religious Employer Exemption.

We urge you to stand firm in the face of pressure to change the administrative rule that would require health insurance plans to cover contraceptives without co-pays or deductibles. The rule as adopted already contains a strong exemption allowing approximately 335,000 churches/houses of worship to opt out of providing contraceptive coverage for their employees. This exemption is nearly identical to the exemption in New York State's contraceptive coverage law. We strongly urge you not to expand this exemption to include a broader category of religiously affiliated non-profit organizations.

New York helped paved the way for greater access to contraceptives by enacting the Women's Health and Wellness Act in 2002. This legislation extended broad consumer protections for women's health care by requiring employee health insurance plans to cover breast and cervical cancer screening, osteoporosis exams, and prescription contraceptives when the plan covered prescriptions. The impetus for this legislation was the finding that women were saddled with greater out-of-pocket costs for health care services than males, mainly due to the common exclusion of contraceptive coverage.

New York's religious exemption, upon which the federal exemption is based, strikes a careful and appropriate balance of protecting religious freedom and preventing discrimination against female employees. Under the law, employers engaged in purely religious activities – such as churches and seminaries – are exempted from having to provide contraceptive coverage to their employees. However, employers that are engaged in secular activities – such as religiously affiliated hospitals and social services agencies, that do not primarily serve and employ those of the same faith – are not exempted. Their employees – nurses, janitors, laundry room staff and the like – often come from a wide variety of religious backgrounds and should not be expected or forced to subscribe to the religious views of their employer on matters of basic health services.

This law has withstood constitutional challenge, and was upheld at all three levels of New York's state courts. In 2007, the U.S. Supreme Court refused to hear the case. California's contraceptive equity law, which is similar to New York's, has also withstood legal challenges.

2. A Limited Accommodation that Guarantees Seamless Access to Contraception.

In the case of health plans sponsored by non-exempt religious organizations, the Departments have proposed a requirement that health insurance plan providers assume responsibility for the provision of contraceptive coverage without cost sharing for covered participants and beneficiaries independent of the employer's sponsorship, as a means of accommodating the non-exempt organizations.

Since the BPCLC does not support an expansion of the existing exemption, we maintain that an accommodation could only be justifiable if employees of religious organizations have seamless access to contraceptive coverage to the same extent as employees of non-exempt organizations.

Accordingly, such an accommodation must ensure that participants and beneficiaries receive contraceptive coverage without cost sharing and without paying a premium charge for the coverage. Any other outcome would undermine Congress's determination through its passage of the ACA that coverage of recommended preventive services without cost sharing is necessary to

achieve basic health coverage for more Americans and to remedy discrimination against women in health care.

Contraceptive coverage must also be provided automatically and directly, without special enrollment or delay, and the privacy of participants and beneficiaries who use the coverage must be properly protected. The services must also be comprehensive and women must have full access to the contraceptive coverage required under the law.

Any accommodation offered to universities and colleges for their student health plans must examine and address the unique barriers facing students seeking contraception.

Finally, if the Departments adopt an accommodation for non-exempt religious organizations, the definition for religious organizations must be limited, and must exclude any for-profit enterprises, health insurance issuers, or third party administrators.

The development of an accommodation that provides seamless access to contraceptive coverage is not only necessary to fulfill the goals of the preventive services provision, but is also required by other provisions of the ACA and other federal laws prohibiting discrimination in benefits.

3. Preemption Principles

BPCLC strongly supports the Departments' application of preemption principles that both allow the continued enforcement of state contraceptive coverage laws that are more protective of beneficiaries access to contraceptive coverage, and preempt those that undermine the federal contraceptive coverage requirement. The Departments should make clear that these preemption principles will apply beyond the temporary enforcement safe harbor period. The Departments should also clarify that grandfathered plans must continue to comply with applicable state contraceptive coverage requirements.

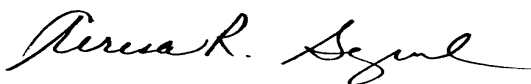
In summary, the BPCLC strongly opposes any expansion of the religious employer exemption. If the Departments move forward with a new accommodation for religious organizations, it must be limited and structured in a seamless way that guarantees access to no-cost contraceptives in the simplest way possible.

Thank you for the opportunity to submit these comments. Should you have any questions, you may reach the BPCLC through the office of State Senator Liz Krueger at 212-490-9535.

Sincerely,



Assemblymember Ellen Jaffee



Assemblymember Teresa R. Sayward



Senator Liz Krueger



Senator Andrea Stewart-Cousins