October 27, 2014

Office of Health Plan Standards and Compliance Assistance,
Employee Benefits Security Administration, Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attention: Preventative Services

RE: Interim Final Rules for Coverage of Certain Preventative Services Under the Affordable Care Act, CMS–9939-IFC, RIN 0938-AR42

Dear Sir or Madam:

Americans United for Separation of Church and State submits the following comments to the interim final rules, “Coverage of Certain Preventative Services Under the Affordable Care Act,” (“Interim Final Rule”) from the Department of the Treasury, Department of Labor, and Department of Health and Human Services (“Departments”), which was published in the Federal Register on August 27, 2014.¹

We understand that this Interim Final Rule is offered in response to the U.S. Supreme Court’s decision in Wheaton College v. Burwell.² In that case, the Court allowed a religious nonprofit organization, which challenged the religious accommodation created under the July 2013 Final Rule,³ to use an alternate means of opting out of providing otherwise mandatory insurance coverage for contraceptives. The Interim Final Rule mirrors the Court’s order by allowing eligible organizations who wish to opt out of providing contraception coverage to do so by notifying the Department of Health and Human Services (“HHS”) rather than by filing a form with their insurance company or third party administrator.

We greatly appreciate that in the wake of the Supreme Court’s decision, the Administration remains committed to ensuring that women receive insurance coverage of contraceptives without cost sharing. As our comments will explain, we believe the Interim Final Rule is more than sufficient to alleviate religious objections to contraception coverage while still providing women access to essential medical care.

Background

The Current Regulations
In August 2011, HHS issued interim final regulations implementing the Affordable Care Act’s (ACA) Women’s Health Amendment. The regulations require that all new employee health insurance plans cover women’s preventative health services, including contraception, without cost sharing.\(^4\) The regulations also exempted certain religious employers from the contraception coverage requirement. The “primary goal of the exemption was to exempt the group health plans of houses of worship.”\(^5\)

Some religious groups complained that the exemption was too narrow and should be expanded to apply to more than just houses of worship. In response, the Administration created an accommodation for an even broader category of nonprofit religious organizations, which was detailed in a final rule issued in July 2013 (“July 2013 Final Rule”). Under the accommodation, qualifying nonprofit religious organizations are not required to provide, pay for, or inform employees about how to access other insurance coverage for contraceptives. Instead, insurance companies will provide employees of these organizations contraceptive coverage at no cost. In that way, the accommodation respects religious objections while guaranteeing that women who work for such nonprofits will have seamless, no-cost insurance coverage for contraception.

The July 2013 Final Rule sets out the process for organizations to object to the contraception coverage requirement. To qualify, an organization must be a nonprofit entity that holds itself out as religious and that objects to providing some or all of the contraceptive services required by the ACA. The organization must self-certify that it meets the preceding criteria by filing a self-certification form with its insurer or, in the case of self-insured plans, with its third party administrator (“TPA”).

The Interim Final Rule modifies the accommodation process to allow eligible organizations to provide a self-certification form directly to HHS. In order to facilitate coverage, those organizations choosing to notify only HHS must also provide the name and type of insurance coverage along with the name and contact information of their TPA.

The Wheaton College Decision
On July 3, 2014, the U.S. Supreme Court issued *Wheaton College v. Burwell*,\(^6\) an unsigned opinion in a case challenging the procedure for obtaining a religious accommodation to the contraception mandate. Wheaton College, a Christian liberal arts college, claimed the opt-out process created under the July 2013 Final Rule violated its religious beliefs. The school reasoned that the procedure forced it to “play a central role in the government’s scheme, because it must designate an agent to pay for the objectionable services on Wheaton’s behalf, and . . . take steps to trigger and facilitate

\(^4\) Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services under the Patient Protection and Affordable Care Act, 45 C.F.R.§ 147.130 (2011).
\(^5\) Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (proposed Feb. 6, 2013).
\(^6\) 134 S. Ct. at 2807.
that coverage.”\(^7\) Wheaton College’s main assertion was that the accommodation required the college to provide a form – EBSA Form 700 – to its TPA in order to make an objection and that the form triggered contraception coverage by that TPA. This, the college argued, made it complicit in the act of providing coverage for contraception.\(^8\) The majority’s opinion did not reach the merits of Wheaton College’s challenge, but it did rule that because the government was already aware of Wheaton College’s objection, the school did not need to provide additional notification and self-certification of its religious objections to its TPA.\(^9\)

We do not agree with the majority in *Wheaton College*, but rather with the dissent, which said that the Court’s decision went too far.\(^10\) Justice Sotomayor noted that allowing the college to use this alternative remedy was superfluous, as the self-certification process was “the least intrusive way for the Government to administer the accommodation.”\(^11\) She further noted that the Court, just days before in *Burwell v. Hobby Lobby Stores, Inc.*, had ruled that religious nonprofits like Wheaton College already had a workable means of objecting to the ACA’s contraception requirement that constituted “the least restrictive means of furthering the Government’s compelling interests in public health and women’s well-being.”\(^12\) By granting eligible organizations another mechanism to object, the court was effectively “[s]tepping into the shoes of HHS . . . to craft a new administrative regime.”\(^13\)

Although we take the position that creating this alternative notification process is wholly unnecessary, we appreciate that the Administration has moved swiftly in response to the Court’s decision to ensure that women continue to receive seamless coverage for cost-free contraception.

**The Current Nonprofit Accommodation Does Not Violate RFRA**

Neither the opt-out process created under the July 2013 Final Rule, nor the opt-out process created by this Interim Final Rule, violates the Religious Freedom Restoration Act (“RFRA”). Under both rules, all a nonprofit religious organization must do to avoid the contraception mandate is simply fill out a form noting its religious objection and supply the form to its insurer, TPA, or HHS. As the Supreme Court recently noted in *Hobby Lobby*,\(^14\) this accommodation is a sufficient mechanism for providing entities a means to opt out of providing contraception coverage, while still ensuring that women receive that coverage. Justice Kennedy, in his concurrence, explained that the nonprofit accommodation was “an existing, recognized, workable, and already-implemented framework to provide coverage.”\(^15\)

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8 Id. at 21.
9 *Wheaton College*, 134 S. Ct. at 2807.
10 Id. at 2813 (Sotomayor, J., dissenting).
11 Id. at 2814(Sotomayor, J., dissenting).
12 Id. at 2808 (Sotomayor, J., dissenting)(citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).
13 Id. at 2814(Sotomayor, J., dissenting).
14 134 S. Ct. at 2782.
15 Id. at 2786 (Kennedy, J., concurring).
The Accommodation as Required by the July 2013 Final Rule

Despite claims to the contrary by organizations like Wheaton College, the original opt-out mechanism does not create a substantial religious burden. In fact, prior to the ongoing litigation over the current nonprofit accommodation, no court has ever held that an opt-out process itself constitutes a burden. In the case University of Notre Dame v. Sebelius, for example, the Seventh Circuit upheld the current accommodation, concluding that requiring nonprofit organizations to fill out and submit EBSA Form 700 does not burden those organizations’ religious exercise. The court explained: “The process of claiming one’s exemption from the duty to provide contraceptive coverage is the opposite of cumbersome. It amounts to signing one’s name and mailing the signed form to two addresses.” And, the court in Notre Dame also rejected the University’s “paradoxical and virtually unprecedented” argument that submitting EBSA Form 700 directly to its insurer or TPA created a trigger for contraception coverage, therefore, implicating Notre Dame in the coverage.

Courts have held that “the government’s imposition of an independent obligation on a third party does not impose a substantial burden” on an entity that invokes the accommodation. In these cases, the government is lifting the alleged burden from the religious organization and instead requiring the insurance company to provide coverage independent of the religious organization. Accordingly, the government action can be seen, at most, as an “incidental” burden on the religious organization.

An opt out like the one afforded by the accommodation operates the same as a wartime conscientious objector filing his objection to the draft or a judge who provides a written recusal in a death penalty case because he objects to capital punishment. Neither the conscientious objector nor the judge could claim a right under RFRA to refuse to object in writing because such objection would initiate a process to find a replacement. To hold otherwise, would be to create an untenable scheme by which the religious objectors could fully cripple the government’s objective.

As Justice Sotomayor pointed out in Wheaton College, it is not the accommodation procedure itself that some religious groups object to, but rather “what troubles [such organizations] is that it must participate in any process the end result of which might be the provision of contraceptives to its employees.” But, Wheaton College and others do not have the right to nullify entire regulatory schemes. Although these organizations may refuse to pay for or arrange for certain benefits, they cannot preclude the government from making those benefits available via third party

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16 743 F.3d 547, 558 (7th Cir. 2014).
17 Id.
18 Univ. of Notre Dame, 743 F.3d at 557.
19 Id. at 554-56.
22 Wheaton College, 134 S. Ct. at 2813 (Sotomayor, J., dissenting)(emphasis in original).
23 Hobby Lobby, 134 S. Ct. 2751.
arrangements. Indeed, religious freedom “does not afford an individual a right to dictate the conduct of others.”

**The Accommodation under the Interim Final Rule**

Like the prior rule, the Interim Final Rule does not violate RFRA. If anything, the Interim Final Rule provides an alternate process that would reduce any alleged burden on religious beliefs, as organizations have the option to report to the government rather than the insurer or TPA that directly provide contraception coverage. The Interim Final Rule could even be said to be more narrowly tailored than the original accommodation because it provides organizations more options to comply with the law.

Nonetheless, some religious groups are asserting that they will suffer a significant religious burden even under the alternative notification provision in the Interim Final Rule. They maintain that the new notice requirement is no better than the EBSA Form 700 because the new process requires organizations to provide HHS with the plan name and type as well as the name and contact information for any of the plan’s TPAs. Such a requirement, they say, continues to force religious groups to “authorize their insurance company or TPA to engage in conduct they believe is immoral” and to “incentivize their TPA to engage in immoral conduct by rendering them eligible for reimbursement. . . .”

The Interim Final Rule, however, provides a reasonable alternative for groups wishing to avail themselves of the accommodation but who do not wish to directly contact their insurer or TPA with their objection. If the accommodation is to function properly – or at all – organizations must provide HHS with the information necessary for the government to independently facilitate contraception coverage. The government cannot be responsible for searching for religious groups’ insurers or TPAs, a task that would be “daunting – if not impossible” and would require “unnecessary costs and layers of bureaucracy.” And, as case law already demonstrates that the nonprofit accommodation does not violate RFRA, neither will the accommodation’s alternative notification provision: it has the same effect as the original accommodation and creates an “additional link in the causal chain” that further attenuates the so-called burden on religious organizations.

**The Current Regulations Do Not Violate Religious Freedom**

Some organizations have submitted comments arguing that the entire regulatory scheme governing the contraception mandate is problematic because it creates an “arbitrary gerrymander of the

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24 See Univ. of Notre Dame, 743 F.3d at 555.
27 See Joint Supplemental Brief supra note 26, at 6-7.
28 Wheaton College, 134 S. Ct. at 2815 (Sotomayor, J., dissenting).
29 See Joint Supplemental Brief supra note 26, at 7 (conceding that “because the new regulations no longer force Plaintiffs to submit the self-certification directly to their insurance company or TPA, they insert one additional link into the causal chain.”)
religious community.” They assert that the full exemption, which is currently only available for houses of worship, should be extended to all religious organizations. But, regardless of whether the government should have granted houses of worship the full exemption in the first place, its doing so does not render the accommodation unconstitutional.

The current scheme does not “in a selective manner impose burdens only on conduct motivated by religious belief.” It is not under inclusive in a way that suggests the government targeted one religion for disfavored treatment. And, it cannot be said that “the burden of the [regulations], in practical terms, falls on [certain religious] adherents but almost no others.” Indeed, “that the exemption is not broad enough to cover” all organizations affiliated with a religious entity “does not mean that the exemption discriminates” against religion.

There is precedent and reasonable justification for treating houses of worship and religious organizations differently when it comes to religious accommodations in this and other contexts. The Religion Clauses of the First Amendment give special consideration to the rights of houses of worship. Here, the government drew the line between houses of worship and other organizations based on the fact that “[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection” and their employees “would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.” Moreover, extending the exemption beyond houses of worship undermines the government’s compelling interest in providing cost-free contraception to all women.

**The Administration Has Taken Action in a Reasonable Manner to Prevent Violations of Religious Liberty**

Groups opposing this Interim Final Rule claim that “the interim final rules offer not even a gesture in the direction of conscience protection,” and maintain that they – like all the other actions the Administration has taken – continue to violate their religious beliefs. These groups, however, have been making the same arguments since the enactment of the contraception mandate. Despite continued attempts by this Administration to provide these groups every opportunity to opt out of such coverage, it is clear that they will not be satisfied until the contraception mandate is entirely gutted. Such a result, however, would be unacceptable.

31 See id.
33 See id. at 536.
37 Comments on Interim Final Rules, supra note 30 at 7.
We applaud the Administration’s commitment to preserving religious freedom, while at the same time, ensuring that women are not denied contraception coverage because of their employers’ religious beliefs. We do not believe that the latest change to the process of obtaining an exemption is necessary, but we appreciate the Administration is acting in response to the decision in *Wheaton College*. As the Administration moves to finalize this Interim Final Rule, we urge it to reject efforts to further expand the exemption or further amend the opt-out process.

Thank you for your consideration.

Sincerely,

The Rev. Barry Lynn

Maggie Garrett