October 21, 2014

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

Attention: CMS-9940-P


Dear Administrator Tavenner:

Americans United for Separation of Church and State submits the following comments to the proposed rule, “Coverage of Certain Preventative Services Under the Affordable Care Act,” ("Proposed 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 these proposed rules are offered in response to the U.S. Supreme Court’s decision in Burwell v. Hobby Lobby Stores, Inc.,² which held that certain “closely held” for-profit corporations may utilize the Religious Freedom Restoration Act (RFRA) to trump current regulatory requirements and refuse to provide coverage for contraception under their employer-based health insurance plans. The Proposed Rule, therefore, would extend the religious accommodation for non-profit religious organizations to “closely held” corporations like Hobby Lobby, Conestoga Wood Specialties, and Mardel.

We greatly appreciate that, in the wake of the Supreme Court decision, the Administration remains committed to ensuring that women receive insurance coverage of contraceptives without cost sharing. As our comments will explain, however, we believe the proposed definitions of “closely held” for-profit corporations set out in the Proposed Rule fail to capture important components of the Hobby Lobby decision.

Americans United
Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true

² 134 S. Ct. 2751 (2014).
religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. Such accommodations, however, must not be applied more broadly than necessary to protect religious freedom. One danger of granting overly expansive religious exemptions is that they may have a negative impact on innocent third parties, such as women seeking access to contraceptive coverage.

Although we have previously opposed efforts to expand the non-profit accommodation to include for-profit entities, we acknowledge that the Administration’s rulemaking is being done “in light of Hobby Lobby,” to fill the gap in coverage created by the Supreme Court’s decision. Thus, we urge the Administration to expand the existing accommodation only to the extent necessary to comport with the ruling in Hobby Lobby.

Background

The Current Regulations
In August 2011, the Department of Health and Human Services (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. The regulations also created an exemption from the contraception coverage requirement for certain religious employers. The “primary goal of the exemption was to exempt the group health plans of houses of worship.”

In July 2013, the Administration issued another final rule that provides an accommodation for an even broader category of non-profit religious organizations. Qualifying non-profit 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. The accommodation guarantees that women who work for such non-profits will have seamless, no-cost insurance coverage for contraception.

The Hobby Lobby Decision
On June 30, the Supreme Court issued a decision in Burwell v. Hobby Lobby, Inc., holding that “closely held” for-profit employers with sincere religious objections may utilize RFRA to trump the current regulations and deny women coverage for contraception. Specifically, the majority held that the owners of three for-profit corporations—Hobby Lobby, Conestoga Wood Specialties, and

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3 Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,118.
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).
Mardel—hold sincere religious beliefs that were substantially burdened by the contraception coverage requirement. The majority also concluded that the law was not narrowly tailored because the government could employ other options, such as extending the current accommodation for non-profit religious organizations to these “closely held” for-profit corporations, to achieve the same goal of providing women contraception coverage with no cost sharing. Justice Kennedy, in his concurrence, explained that the law was not narrowly tailored because “there is an existing, recognized, workable, and already-implemented framework to provide coverage”7—the non-profit accommodation—and the government could “accommodate the plaintiffs’ similar religious objections under this established framework.”8

We believe that Hobby Lobby was wrongly decided. Never before had the Supreme Court ruled that a for-profit organization may deny legal rights to its employees’ in the name of religion. We argued before the Court that any religious burden the contraception requirement might have caused the plaintiffs in the case was incidental and attenuated rather than substantial.9 Accordingly, the RFRA claim should have failed. Nonetheless, the Court held in favor of Hobby Lobby and the other plaintiff corporations. As the law stands now, “closely held” for-profit corporations whose owners and operators have sincere religious beliefs opposing insurance coverage for contraception can opt out of the requirement and their employees have no access to contraceptive coverage without cost sharing.

Recognizing that Hobby Lobby has left many women without the insurance coverage they need, we appreciate that the Administration is moving quickly to ensure that they these women will also be offered contraception coverage without cost sharing. And, as is indicated in both the majority opinion and Justice Kennedy’s concurrence, the most obvious way of achieving this goal expeditiously is to extend the accommodation to “closely held” for-profit corporations.

Defining “Closely Held” For-Profit Corporations Consistent with the Hobby Lobby Decision

The Proposed Rule solicits comments on how to delineate which “closely held” for-profit corporations should be eligible for the accommodation and offers two definitions. Both proposals would apply only to corporations that are not publicly traded. The proposals differ on whether to define eligible entities based upon a specific number or a percent of equity holders.10 These definitions, however, fail to capture key components of the Hobby Lobby decision.

The corporations in Hobby Lobby succeeded with their RFRA claim because the Court saw the corporate business as an extension of the Hahn and Green families. The majority explained: “protecting the free exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control these companies.”11 Only when there is a shared religious belief between the people who own and control the companies and they agree to run the corporations in accordance with those beliefs, can the entities make successful RFRA claims on behalf of those people.

7 Hobby Lobby, 134 S. Ct. at 2786 (Kennedy, J., concurring).
8 Id.
9 Brief for Americans United for Separation of Church and State, et al. as Amici Curiae Supporting Appellees at 4, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).
10 Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,122.
11 Hobby Lobby, 134 S. Ct. at 2768 (emphasis added).
In *Hobby Lobby*, there existed a unity of interest between the owners and the corporations such that the corporations’ business practices reflected and promoted the owners’ religious beliefs. The Hahns and Greens held exclusive control over their businesses, all shared the same religious beliefs, and unanimously agreed to run their businesses in accordance with those beliefs. All of this was reflected in the corporate documents. Only those corporations that can demonstrate through their ownership and control a shared desire to operate according to a specific set of religious beliefs, therefore, should qualify under the proposed rule for the accommodation.

**Only Corporations that Are Not Publicly Traded Should Qualify as a “Closely Held” Corporation**

We support the Proposed Rule’s exclusion of publicly traded corporations from its definition of “closely held.” Justice Alito specifically limited the reach of *Hobby Lobby* to privately held corporations, writing that the case “do[es] not involve publicly traded corporations” and “we have no occasion in these cases to consider RFRA’s applicability to such [publicly traded] companies.”

Moreover, including publicly-traded companies in the definition of an eligible for-profit would likely include companies with shareholders who do not share a single religious purpose; the corporation would then not reflect the religious beliefs of its equity holders, as required by *Hobby Lobby*.

**Those Who Own and Operate the Corporation Should Hold Shared Religious Beliefs, Agree to Run the Business in Accordance with those Beliefs, and Document that Agreement**

The companies represented in *Hobby Lobby* were “each owned and controlled by members of a single family,” who hold a sincere religious objection to contraceptive insurance coverage. The families also agreed to run the companies in accordance with these beliefs and adopted corporate documents to reflect this agreement. The rule should be amended to better reflect these key aspects of the “closely held” corporations in the case.

**The Families Had Full Ownership and Control Over the Companies**

The Hahns and Greens hold full ownership and control over their companies. The Hahns, a family of five, have “sole ownership” of the Conestoga Wood Specialties corporation. The family “control[s] its board of directors and hold[s] all of its voting shares.” One of the Hahn sons serves as the President and CEO of the business. Similarly, the Greens are a family of five that “own and operate” Hobby Lobby and Mardel. The family “retain[s] exclusive control of both companies” and hold the positions of CEO, Vice-CEO, President, and Vice-President. One of the Green sons runs Mardel.

**All Those Who Owned and Controlled the Company Had Shared Religious Beliefs and Agreed to Run the Company in Accordance with Those Beliefs**

All of the members of each family also hold the same religious beliefs. The Hahns are “devout members of the Mennonite Church” and similarly, the Greens are all Christians. In addition, “like...”

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11 Id. at 2774.
12 Id.
13 See id.
14 Id.
15 Id.
16 Id. at 2764.
17 Id. at 2765.
18 Id.
the Hahns, the Greens believe . . . that it would violate their religion to facilitate access to contraceptive drugs.”

Furthermore, all of the families unanimously agreed to run their corporations in accordance with those beliefs. For example, all of the Hahns “believe that they are required to run their business ‘in accordance with their religious beliefs and moral principles.’” And, “each [Green] family member has signed a pledge to run the businesses in accordance with the family’s religious beliefs and to use the family assets to support Christian ministries.”

The Corporate Documents Reflected the Agreement to Run the Companies in Accordance with These Shared Religious Beliefs

The mission statement of Conestoga Wood Specialties states that it will “operate in a professional environment founded upon the highest ethical, moral, and Christian principles.” Its “Vision and Values Statement” explicitly affirms that the company would operate “‘in [a] manner that reflect [the Hahns’] Christian heritage.’” And, the company’s board of directors formally adopted a statement describing the family’s belief on “the Sanctity of Human Life.”

Hobby Lobby adopted a statement of purpose committing the company to “‘[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” Each family member has signed a “pledge to run the businesses in accordance with the family’s religious beliefs.” And, the business operates in a manner reflecting these beliefs: the business is closed on Sundays and their advertisements invite people to “know Jesus as Lord and Savior.”

We believe that the definition of “closely held” could better reflect these key aspects of the owner-corporation relationships involved in the Hobby Lobby case.

Requiring Corporate Action and Notification for the Accommodation

Under the Proposed Rule, a corporation would have to take valid corporate action stating that the owners object to providing contraception coverage in order to avail itself of the accommodation. We support this proposal.

Following corporate action, the corporation should then self-certify in a manner consistent with the self-certification requirement for non-profit organizations seeking the accommodation that it has taken such action and provide supporting documentation of that fact. However, if the final rule does not require documentation beyond self-certification, we ask the Departments to clarify that

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19 Id. at 2764-66.  
20 Id. at 2764.  
21 Id. at 2766.  
22 Id. at 2764.  
23 Id.  
24 Id.  
25 Id. at 2766.  
26 Id.  
27 Id.  
the record retention requirements in the current regulations extend to such supporting documentation.

This process will ensure that the Departments can engage in appropriate oversight and enforcement of the accommodation process. The added requirement for corporate action is necessary because the religious nature of a for-profit corporation is less easily discernible than that of a religious non-profit. For example, the corporations in Hobby Lobby focus on different products – one of the companies manufactures wood cabinet and specialty products and another operates a crafts supply store chain. Without more than just the description of the companies, it is difficult to know which closely held for-profit corporations have equity holders exercising their religious beliefs through their corporations.

**Conclusion**

The Administration has worked tirelessly through the rulemaking process to ensure that the religious objections of some employers do not jeopardize the rights their employees have to medical care. Although the Hobby Lobby decision upended the balance between religious freedom and the access to healthcare that the Administration had created through the exemption and accommodation, the Proposed Rule is an expeditious solution to ensure that women continue to receive contraception free from cost sharing. By expanding the accommodation to include “closely held” for-profit corporations whose owners hold sincere religious beliefs opposing the coverage of contraception, many women currently lacking this coverage will regain it. To that end, we recommend that the final rule expand the accommodation only so far as it is consistent with the facts in Hobby Lobby.

Thank you for your consideration.

Sincerely,

The Rev. Barry Lynn

Maggie Garrett

[Signatures]