



Institute *for*  
**Policy Integrity**  
NEW YORK UNIVERSITY SCHOOL OF LAW

**December 5, 2017**

**VIA ELECTRONIC SUBMISSION**

**Attn:** Centers for Medicare & Medicaid Services, Department of Health and Human Services

**Subject:** Comments on Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 6, 2017)

**Docket Nos.** TD-9827, CMS-9940-IFC

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> (“Policy Integrity”) respectfully submits the following comments on the joint Department of Health and Human Services, Internal Revenue Service, Department of the Treasury, and Department of Labor (collectively “the Departments”) interim final rule “Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act,” 82 Fed. Reg. 47,792 (Oct. 6, 2017) (“the Religious Exemption Rule”).

Guidelines issued pursuant to the Patient Protection and Affordable Care Act (ACA) require certain group health plans and health insurance issuers to cover contraceptive services. The Departments previously exempted houses of worship and integrated auxiliaries from this requirement. The Religious Exemption Rule expands the exemption to nonprofits, higher education institutions, closely held for-profit corporations, and publicly traded for-profit corporations with religious objections to providing contraceptive coverage.

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comment:

- ***The Departments’ cost-benefit analysis is inadequate.***

The Departments’ cost-benefit analysis is unreasonable in at least two respects. First, the Departments ignore costs that the Religious Exemption Rule may impose on women by

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<sup>1</sup> No part of this document purports to present New York University School of Law’s views, if any.

reducing access to contraception. Second, the Departments obscure the economic impacts of the Religious Exemption Rule by failing to disaggregate its costs and benefits from those of the separate Moral Exemption Rule.<sup>2</sup>

## **I. The Departments Fail to Consider the Religious Exemption Rule's Full Costs for Women**

A proper regulatory cost-benefit analysis considers all of a rule's reasonably foreseeable consequences, positive and negative.<sup>3</sup> Here, the Departments calculate only one of the Religious Exemption Rule's economic consequences: an increase in women's out-of-pocket expenditures for birth control that, in the absence of the Religious Exemption Rule, would have been covered by insurance.<sup>4</sup> The Departments fail to estimate the extent to which the Religious Exemption Rule will reduce *access* to contraception. They also fail to assess the economic consequences of that reduction in access.

### *A. The Departments Do Not Adequately Assess the Religious Exemption Rule's Potential to Reduce Access to Contraception*

Although the Departments acknowledge in a footnote that the Religious Exemption Rule "can be expected to lead to some decrease in use of the affected drugs and devices," they make no effort to predict the likely magnitude of this decrease in contraception use.<sup>5</sup> Instead, they play down the issue's significance, noting that "there are multiple Federal, State and local programs that provide free or subsidized contraceptives for low-income women."<sup>6</sup> Some women, however, may lack access to such programs, either because the

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<sup>2</sup> Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838 (Oct. 6, 2017).

<sup>3</sup> Executive Order 12,866 states that "[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) [hereinafter E.O. 12,866]. Additionally, the Administrative Procedure Act requires agencies engaged in rulemaking to "examine the relevant data and articulate a satisfactory explanation for [their] action[s]" and precludes them from ignoring "an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); see also *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

<sup>4</sup> This out-of-pocket cost is a transfer payment, as the direct cost of contraception is being shifted from exempt employers to their female employees.

<sup>5</sup> 82 Fed. Reg. at 47,821 n.84.

<sup>6</sup> 82 Fed. Reg. at 47,804.

programs are not available in their areas, or because they do not meet relevant income criteria.<sup>7</sup>

Indeed, prior to the passage of the ACA, many women were unable to afford contraception, even with insurance, because of high co-pays or deductibles.<sup>8</sup> Post-ACA decreases in cost-sharing were associated with better adherence and more consistent use of the pill, especially among users of generic pills.<sup>9</sup> One study showed that even copayments as low as \$6 were associated with higher levels of discontinuation and non-adherence.<sup>10</sup>

Furthermore, even if the Religious Exemption Rule does not deny a woman access to contraception altogether, it might lead her to choose a less effective method for financial reasons.<sup>11</sup> For example, instead of using a more effective, but more expensive, intrauterine device, women may choose a less effective, but cheaper, birth control pill.<sup>12</sup>

*B. The Departments Fail to Acknowledge the Negative Economic Consequences of Reduced Access to Contraception*

In a 2012 rulemaking, the Departments explained that access to contraception has significant economic benefits for women:

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<sup>7</sup> See *Committee Opinion on Access to Contraception*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, <https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Access-to-Contraception> (last visited Dec. 1, 2017); *Birth Control Access Map*, THE NAT'L. CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCIES, <https://thenationalcampaign.org/deserts> (last visited Dec. 1, 2017) (showing that 19 million women between ages 13 and 44 lack “reasonable access” to contraceptives and that 3 million of these women live in counties without a single public clinic).

<sup>8</sup> See generally Su-Ying Liang et al., *Women 's Out-of Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 *Contraception* 528, 531 (2011). Additionally, a survey conducted by Hart Research Associates found that 34 percent of women have struggled to pay for birth control. Press Release, Planned Parenthood, Survey: Nearly Three in Four Voters in America Support Fully Covering Prescription Birth Control (Jan. 30, 2014), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/survey-nearly-three-four-voters-america-support-fully-covering-prescription-birth-control>.

<sup>9</sup> Lydia E. Pace, Stacie B. Dusetzina & Nancy L. Keating, *Early Impact of the Affordable Care Act On Oral Contraceptive Cost Sharing, Discontinuation, And Nonadherence*, 35 *HEALTH AFFAIRS* 1616, 1616-24 (2016); see also KAISER FAMILY FOUNDATION, NEW REGULATIONS BROADENING EMPLOYER EXEMPTIONS TO CONTRACEPTIVE COVERAGE: IMPACT ON WOMEN (Oct. 6, 2017), <https://www.kff.org/womens-health-policy/issue-brief/new-regulations-broadening-employer-exemptions-to-contraceptive-coverage-impact-on-women/>.

<sup>10</sup> See Pace et al., *supra* note 9; KAISER FAMILY FOUNDATION, *supra* note 9.

<sup>11</sup> Caroline S. Carlin, Angela R. Fertig & Bryan E. Down, *Affordable Care Act's Mandate Eliminating Contraceptive Cost Sharing Influenced Choices of Women with Employer Coverage*, 35 *HEALTH AFFAIRS*, 1608, 1608-1615 (2016); Michelle Andrews, *IUD, Implant, the Pill: Cost May Play a Role in Choice of Contraceptives*, WASH. POST, Feb 17, 2012, [https://www.washingtonpost.com/national/health-science/iud-implant-the-pill-cost-may-play-a-role-in-choice-of-contraceptives/2012/02/15/gIQAQnrWKR\\_story.html?utm\\_term=.a6fe6d28a429](https://www.washingtonpost.com/national/health-science/iud-implant-the-pill-cost-may-play-a-role-in-choice-of-contraceptives/2012/02/15/gIQAQnrWKR_story.html?utm_term=.a6fe6d28a429).

<sup>12</sup> Andrews, *supra* note 11.

Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force . . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services.<sup>13</sup>

It follows that any *reduction* in contraception access resulting from the Religious Exemption Rule would impose economic costs on affected women. But the Departments' cost-benefit analysis makes no mention of these costs.

Nor do the Departments acknowledge contraception's many health benefits beyond reductions in unwanted pregnancies, such as reduction in the risk of ovarian cysts, possible protection against bone loss with estrogen-containing oral contraceptives, improvement of symptoms of endometriosis, and general improvement of negative symptoms associated with the menstrual cycle.<sup>14</sup> Any reduction in contraception access associated with the Religious Exemption Rule would likely entail a reduction in these benefits as well.

## **II. The Departments Fail to Disaggregate the Impacts of the Religious Exemption Rule from the Impacts of a Separately Promulgated Moral Exemption Rule**

The Religious Exemption Rule was issued contemporaneously with "Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the ACA" (the "Moral Exemption Rule"), which creates an exemption from contraceptive coverage requirements for employers with purely moral—not religious—objections to contraceptive care.<sup>15</sup> Although the rules were promulgated separately, the cost-benefit analysis for the Religious Exemption Rule appears to encompass the anticipated effects of the Moral Exemption Rule as well.<sup>16</sup> In other words, the Departments have not disaggregated the costs and benefits of the two rules.

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<sup>13</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012).

<sup>14</sup> Kristina D. Chadwick et al., *Fifty Years of "the Pill": Risk Reduction and Discovery of Benefits Beyond Contraception, Reflections, and Forecast*, 125 TOXICOLOGICAL SCIENCES 2, 4(2012); *What Are the Benefits of Birth Control*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/birth-control/birth-control-pill/what-are-the-benefits-of-the-birth-control-pill> (last visited Dec. 1, 2017).

<sup>15</sup> See 82 Fed. Reg. at 47,838.

<sup>16</sup> *Id.* at 47,815 ("The Departments assess this interim final rule together with a companion interim final rule concerning moral but non-religious conscientious objections to contraception.").

Without isolating the costs and benefits of each rule, however, the Departments cannot fulfill E.O. 12,866's requirement that agencies issue a new rule only upon a finding that the benefits of that particular rule justify its costs.<sup>17</sup> Similarly, the Departments cannot satisfy the Administrative Procedure Act's requirement that they consider relevant data and provide a satisfactory explanation for their action.<sup>18</sup>

Respectfully,

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<sup>17</sup> E.O. 12,866, *supra* note 3, at Sec. 1(b)(6).

<sup>18</sup> See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29, 43.