Congress of the United States
House of Representatives
Washington, D.C. 20515

April 3, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Janet L. Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Julie Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Coverage of Certain Preventive Services Under the Affordable Care Act (RIN: 0938-AU94, 1210-AC13, 1545-BQ35)

Dear Secretaries Becerra and Yellen and Acting Secretary Su:

We write to provide comments on the proposed rules issued by the Departments of Health and Human Services, Labor, and the Treasury (the Departments) entitled *Coverage of Certain Preventive Services Under the Affordable Care Act* (the Proposed Rules).[1] By reversing harmful policies implemented by the Trump Administration and establishing a new pathway to access contraception, we believe the Proposed Rules are a meaningful action for people who need contraception. We support these reforms and encourage the Departments to finalize the Proposed Rules while also considering additional action to further strengthen access to reproductive health care.

Access to Contraception under the Affordable Care Act

The *Affordable Care Act* (ACA)[2] requires non-grandfathered group health plans and issuers offering health insurance coverage in the group and non-group market to cover certain preventive services without cost-sharing.[3] Pursuant to this requirement, preventive care and screenings for women must be covered in a manner consistent with the guidelines established by

[1] 88 Fed. Reg. 7236 (2023) (Hereinafter "Proposed Rules").
[2] Pub. L. No. 111-148 (2010) (as amended by Pub. L. No. 111-152).
[3] 42 U.S.C. § 300gg–13, 29 U.S.C. § 1185d, I.R.C. § 9815.

the Health Resources and Services Administration (HRSA). Accordingly, most health plans and issuers must cover, without cost-sharing, the full range of contraceptives that are approved, cleared, or granted by the U.S. Food and Drug Administration (FDA), effective family planning practices, and sterilization procedures, as well as related services such as follow-up care.[4] This means, for example, plans and issuers must cover without cost-sharing at least one hormonal intrauterine device, combined oral contraceptive pill, progestin-only oral contraceptive pill, implantable rod, vaginal ring, patch, and each of the other contraceptives approved, granted, or cleared by the FDA.

As the Proposed Rules correctly note, Congress enacted this requirement with the goal of eliminating cost barriers and ensuring that individuals have seamless access to vital preventive health services, including contraception.[5] This is critically important, as more than 90 percent of women have used a form of contraception during their lifetime,[6] and out-of-pocket expenses can be financially burdensome without coverage.[7] These costs present a substantial barrier to care, particularly for lower-income individuals and marginalized communities that continue to face inequities in access to reproductive health services.[8]

The Proposed Rules Properly Eliminate the Trump Administration's Moral Exemption

As you are aware, in 2018, the Trump Administration issued Final Rules that expanded exemptions available to objecting entities to include non-religious "moral" objections to providing contraception.[9] As a result, individuals whose health coverage is sponsored by an eligible entity with a "moral" objection could be denied coverage (without a requirement the individual be provided an accommodation), and the individual could be forced to pay out-of-pocket for care that should be free under the ACA. This unprecedented exemption was created with no statutory justification. The text of the ACA includes no reference whatsoever to a "moral" basis for denying individuals access to care, nor can its proponents point to any other law that would compel the Departments to create this loophole. Moreover, this exemption has proven largely unnecessary, as only a very small number of entities have objected based on "moral" grounds to providing contraception.[10] Accordingly, we are pleased that the Proposed

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[4] *Id*.
[5] Proposed Rules at 7254.
[6] Brittni Frederiksen, et al., Contraception in the United States: A Closer Look at Experiences, Preferences, and Coverage, Kaiser Family Foundation (Nov. 3, 2022), https://www.kff.org/report-section/contraception-in-the-united-states-a-closer-look-at-experiences-preferences-and-coverage-findings/.
[7] Sasha Guttentag, The Annual Cost of Birth Control, GoodRx (Apr. 6, 2021), https://www.goodrx.com/conditions/birth-control/annual-cost-of-birth-control (Out-of-pocket costs for oral contraceptives are approximately $268 annually, and other methods can cost more than $2,000 annually).
[8] Madeline Y. Sutton et al, Racial and Ethnic Disparities in Reproductive Health Services and Outcomes 2020, Obstet. Gynecol. (2021), https://pubmed.ncbi.nlm.nih.gov/33416284/.
[9] Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg, 57592 (2018).
[10] Proposed Rules at 7243 ("there have not been a large number of entities that have expressed a desire for an exemption based on a non-religious moral objection").

Rules would fully rescind the moral exemption in its entirety and strongly support the Departments moving forward to finalize this proposal without change.

The Proposed Rules Create a Pathway for People to Receive Contraceptive Services

The Departments propose to establish a new pathway, known as an "individual contraceptive arrangement" (ICA), that would allow individuals whose coverage excludes contraception to receive contraceptive services directly from a health care provider with no out-of-pocket costs.[11] Eligible individuals would include those who are covered by a plan that is provided, sponsored, or arranged by an objecting entity that claims a religious objection to providing contraceptive services.[12] Through the ICA pathway, participating providers may seek reimbursement from insurers who offer Marketplace coverage, and those insurers, in turn, could receive a user fee adjustment sufficient to cover both the cost of the contraceptive services as well as administrative costs.[13] Through this approach, the Proposed Rules would provide people who are affected by contraceptive coverage exclusions a meaningful opportunity to receive contraception without cost-sharing, consistent with the statutory purpose of the ACA of promoting access to preventive care.

Although we remain concerned that the continued existence of broad religious exemptions undermines access to health care, we believe that the ICA proposed by the Departments is an important commitment to improved access for consumers. If implemented as intended, the ICA will ensure that eligible individuals will have access to contraception without cost-sharing regardless of the religious views of their employer or university.

The ICA Pathway Must Be Carefully Implemented to Ensure that it Meaningfully Improves Access to Contraceptive Care

To ensure that the ICA pathway truly expands access to contraceptive services, we encourage the Departments to minimize burdens placed on eligible individuals. We are pleased that the Proposed Rules would allow individuals to self-verify their eligibility by relying on an attestation or easily accessible forms of documentation (such as a Summary of Benefits and Coverage),[14] and we encourage the Departments to carefully consider additional ways to reduce administrative burdens for consumers. To that end, the alternative approach described by the Departments to apply the contraceptive coverage requirement directly to an issuer in the case of insured group health plans and student health coverage would provide the most seamless access to care while avoiding additional administrative complexity for both consumers and providers.[15] We encourage the Departments to consider adopting this approach with respect to insured plans.

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[11] *Id*. at 7252.
[12] *Id*.
[13] *Id*. at 7253.
[14] *Id*.
[15] *Id*. at 7248-9.

In addition, in order for eligible individuals to benefit from the ICA pathway, it is critical that the Departments raise awareness of its availability as an option. We understand that the Departments are carefully weighing approaches to this issue[16] and encourage a comprehensive outreach and education campaign to inform consumers about the ICA pathway and where to find participating providers. As part of these efforts, we encourage the Department of Labor to provide thorough training to prepare Benefits Advisors to assist any eligible individuals who receive job-based coverage.

Finally, the Departments must work to ensure robust participation by both health care providers and insurers. Due to the voluntary nature of the ICA pathway, it may be difficult to ensure that eligible individuals have access to a provider of their desired contraceptive in their area, particularly in rural and underserved communities. Moving forward, the Departments should provide continuous oversight of participation and engage with stakeholders to make necessary adjustments to ensure an adequate number of insurers and providers participate.

The Departments Should Continue Their Work to Protect Access to Contraception and Reproductive Health Care

With access to reproductive health care under increasing attack following the Supreme Court's devastating decision in *Dobbs v. Jackson Women's Health Organization*,[17] it is more important than ever that the Departments take aggressive action to ensure that everyone has access to contraception and reproductive health care. Despite the ACA's clear guarantee of cost-free coverage of preventive health care, there is troubling evidence that plans, issuers, and pharmacy benefit managers continue to apply harmful restrictions on coverage or inappropriately impose cost-sharing.[18]

In response to these concerns, we have previously written to the Departments urging strong action to address medical management requirements, coverage denials, cost-sharing, and other barriers that undermine access to care.[19] We appreciate that the Departments have promptly responded to these concerns by issuing updated regulatory guidance[20] and working to improve compliance by health plan sponsors and issuers.[21] We encourage you to continue to take strong action to ensure that consumers have access to preventive care.

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[16] *Id*. at 7254, 7263.
[17] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).
[18] Staff Report, Committee on Oversight and Reform, U.S. House of Representatives, Barriers to Birth Control: An Analysis of Contraceptive Coverage and Costs for Patients with Private Insurance (Oct. 15, 2022), https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-10-25.COR%20PBM-Insurer%20Report.pdf.
[19] Letter from Chairman Frank Pallone, Jr., Chairman Richard E. Neal, Chairman Robert C. "Bobby" Scott, and Chairwoman Carolyn B. Maloney (Oct. 6, 2021), https://democrats-edworkforce.house.gov/imo/media/doc/2021-10-06%20House%20Chairs%20Letter%20to%20HHS%20re%20ACA%20Contraceptive%20Mandate.pdf.
[20] FAQs About Affordable Care Act Implementation Part 54 (July 28, 2022), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-54.pdf.
[21] Letter from Secretary Xavier Becerra, Secretary Janet L. Yellen, and Secretary Martin J. Walsh (Jun. 27, 2022), https://www.cms.gov/files/document/letter-plans-and-issuers-access-contraceptive-coverage.pdf.

Thank you for your consideration of these comments. We appreciate the opportunity to provide input on the Proposed Rules and we look forward to continuing to work with you on these important issues.

Sincerely,

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