Dec. 5, 2017

Acting Secretary Eric Hargan
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW., Room 445–G,
Washington, DC 20201

RE: Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act: CMS-9925-IFC (moral exemption/accommodation IFR, https://www.regulations.gov/documents?D=CMS-2017-0133-0002

Dear Acting Secretary Hargan,

The American Academy of Nursing (Academy) is committed to ensuring all individuals have affordable health care coverage inclusive of access to birth control. The Academy[1] unequivocally opposes the Departments of Health and Human Services, Labor, and Treasury's (the Departments') efforts to undermine the Patient Protection and Affordable Care Act's (ACA) contraceptive coverage requirement through this Interim Final Rule (IFR).

The ACA's women's preventive services requirement was designed to promote prevention, reduce medical costs, and improve the health, equality, and economic security of women[2] and families. Over 62 million women with private insurance now have coverage of these vital health care services, including breast and cervical cancer screening, breastfeeding services and supplies, and contraception and contraceptive counseling.[3,4] Furthermore, contraceptive medications and devices are prescribed to women for purposes other than contraception; for example, for treatment of gynecologic disorders and menstrual suppression.

This IFR would allow virtually any employer and university to deprive women of contraceptive coverage, thereby harming women's health and well-being, including the largest group of healthcare providers, namely 3.6 million RNs and 2 million nursing aides and assistants—most of whom are women. Further, this IFR ignores Congress' explicit intent that the ACA require coverage of contraception. For these reasons, the Academy calls on the Departments to rescind the IFR.

In this letter, the Academy comments specifically on the "Moral Exemptions and Accommodations IFR" that jeopardizes services based on an expanded definition of objections. In a second letter, we have responded to the "Religious Exemptions and Accommodations IFR" with additional information on how both sets of Rules, which are not based on science and research, have serious implications for

[1] Statement prepared for the Academy by members Diana Taylor, Judith Berg (Women's Health Expert Panel) and Ellen Olshansky (AAN Board), 12/4/2017

[2] This comment uses the term "women" because women are targeted by the IFRs. Notably, we recognize that the denial of reproductive health care and insurance coverage for such care also affects people who do not identify as women, including some gender non-conforming people and some transgender men.

[3] Nat'l Women's L. Ctr., New Data Estimates 62.4 Million Women Have Coverage of Birth Control Without Out-Of-Pocket Costs (Sept. 2017), a*vailable at* https://nwlc.org/wp-content/uploads/2017/09/New-Preventive-Services-Estimates-3.pdf.

[4] Berg JA, Taylor D, Woods NF (2013). Where we are today: Prioritizing women's health services and health policy. A report by the Women's Health Expert Panel of the American Academy of Nursing. Nursing Outlook **61**(1): 5-15, http://dx.doi.org/10.1016/j.outlook.2012.06.004

women's health and disregard the compelling interests furthered by the contraception coverage requirement and regulations included in the Affordable Care Act.[5]

1. **Evidence-based standards of care directs patient care, regardless of religion, faith, or moral convictions. Focus should be on patients and their choices and autonomy in health care.**

Every nurse's primary commitment is to the patient. In addition to providing competent, professional and high quality care, there is also an emphasis on providing patient education and support. The nursing profession holds sacred the patient's right of autonomy to make informed decisions to direct his or her care, as well as the crucial role that nurses play in supporting the patient. Patient education and advocacy are essential elements of the nursing process. Thus, it is the patients' decisions, regardless of faith or moral convictions, that should guide healthcare providers' care of patients, as articulated in the American Nurses Association (ANA) Code of Ethics. It fully supports the rights of patients to determine their own care:

> *"Respect for human dignity requires the recognition of specific patient rights, in particular, the right to self-determination. Patients have the moral and legal right to determine what will be done with and to their own person; to be given accurate, complete, and understandable information in a manner that facilitates an informed decision; and to be assisted with weighing the benefits, burdens, and available options in their treatment, including the choice of no treatment. They also have the right to accept, refuse, or terminate treatment without deceit, undue influence, duress, coercion, or prejudice, and to be given necessary support throughout the decision-making and treatment process. Such support includes the opportunity to make decisions with family and significant others and to obtain advice from expert, knowledgeable nurses, and other health professionals. Nurses have an obligation to be familiar with and to understand the moral and legal rights of patients. Nurses preserve, protect, and support those rights by assessing the patient's understanding of the information presented and explaining the implications of all potential decisions.*
>
> *…. The limitation of individual rights must always be considered a serious departure from the standard of care, justified only when there are no less-restrictive means available to preserve the rights of others, meet the demands of law, and protect the public's health."*[6]

In addition, we endorse the rights of patients to make their own choices about reproductive health, and to receive complete information to assist them in making those choices, as outlined in ANA's position statement on reproductive health:

> *"…the health care client has the right to privacy and the right to make decisions about personal health care based on full information and without coercion. It is the obligation of the health care provider to share with the client all relevant information about health choices that are legal and to support that client regardless of the decision the client makes. Abortion is a reproductive alternative that is legal and that the health care provider can objectively discuss when counseling clients."*[7]

For nurses who have concerns about the provision of reproductive healthcare services, existing laws and ethical guidelines are more than adequate to protect the rights of health care providers to follow their moral and religious convictions.

---

[5] Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47792 et seq.

[6] American Nurses Association (2015). *Code of Ethics for Nurses with Interpretive Statements*. (Interpretive Statement 1.4, pp 2-3). Silver Spring, MD: Nursesbooks.org.

[7] American Nurses Association (1989, 2010). *Position Statement: Reproductive Health.* *www.nursingworld.org/MainMenuCategories/Policy-Advocacy/Positions-and-Resolutions/ANAPositionStatements/Position-Statements-Alphabetically/Reproductive-Health.html*

"Conscience-based refusals to participate exclude personal preference, prejudice, bias, convenience, or arbitrariness. Acts of conscientious objection may be acts of moral courage and may not insulate nurses from formal or informal consequences. Nurses who decide not to participate on the grounds of conscientious objection must communicate this decision in a timely and appropriate manner. Such refusal should be made known as soon as possible, in advance and in time for alternate arrangements to be made for patient care.
…Nurses are obliged to provide for patient safety, to avoid patient abandonment, and to withdraw only when assured that nursing care is available to the patient. When the integrity of nurses is compromised by patterns of institutional behavior or professional practice, thereby eroding the ethical environment and resulting in moral distress, nurses have an obligation to express their concern or conscientious objection individually or collectively to the appropriate authority or committee."[8]

2. Exempting Businesses from Generally Applicable Laws is Bad Policy and Harms Workers

When Congress passed the Women's Health Amendment, it meant to ensure that recommended preventive services for women are covered adequately by non-grandfathered group health plans and group health insurance coverage, recognizing that women have unique health care needs and burdens. Allowing more entities to deprive women of contraceptive coverage, as the IFR does, strikes at the very purpose of the contraceptive coverage requirement.

By prioritizing the moral convictions of organizations above the health and economic interests of women and their families, the rule sets a dangerous precedent both for the Affordable Care Act and for other laws of general applicability. We strongly believe that the ACA Coverage Policy serves the compelling interests of advancing gender equality and mitigating the public health risks of unintended pregnancy. By eliminating the Coverage Policy, the IFR undermines these interests and creates a situation where any business can impose their own moral views on their employees and discriminate against women generally.

3. Women, not employers, should determine evidence-based health care services

A woman and her health care providers, not politicians or employers, should determine the right contraceptive for her health care needs. The IFR not only misrepresents the available science on contraceptive safety, but also allows entities to refuse to cover the contraceptive counseling during which a woman and her health care provider could discuss her specific health history and contraceptive needs. This interferes with the relationship women have with their regular health care provider and conversations about if, and when, to become pregnant and which contraceptive to use when not seeking pregnancy.

In the face of these facts, the IFR not only denies how important birth control is to women's health and lives, but implies that birth control is not health care at all. It is of increasing concern that institutional barriers based on moral convictions that restrict insurance coverage for birth control negatively affect patients and nurses in three ways: 1) not all contraceptive methods are covered for patients, and this limits patients' choices; 2) affordable health insurance for patients may not allow alternatives for care provision, thus limiting patient choices; and 3) lack of insurance coverage for all contraceptive methods may affect patients as well as nurses more personally by limiting contraceptive choices based on finances. Nurses employed in institutions or businesses that deny insurance coverage of birth control face ethical concerns about providing complete information to their patients, referring for alternative contraception care, and accessing contraception for maximizing their own health. All of these concerns underlay the American Academy of Nursing's conviction to unequivocally oppose the Departments of Health and Human Services, Labor, and Treasury's (the departments') efforts to

[8] American Nurses Association (2015). *Code of Ethics for Nurses with Interpretive Statements*. (Interpretive Statement 1.4, pp 2-3). Silver Spring, MD: Nursesbooks.org.

undermine the Patient Protection and Affordable Care Act's contraceptive coverage requirement through this IFR.

4. The IFR Violates Statutory and Constitutional Protections

By creating broad exemptions to the ACA's birth control benefit, which has expanded access to contraception for millions of women, the IFR singles out health insurance that women use and that is essential for women's health and equality.

Religious arguments have long been used in attempts to thwart women's equality, just as they have been used to thwart racial equality.[9] But those efforts have time and again been rejected. For example, in passing Title VII of the Civil Rights Act of 1964, Congress barred workplace discrimination based on a variety of factors including race and sex, over objections based on religion.[10] And as society has evolved beyond a religiously imbued vision of women as mothers and wives, courts have rejected efforts to allow religious exemptions to undermine civil rights protections for women.[11]

Like Title VII and other civil rights laws, the birth control benefit was intended to address longstanding discrimination and ensure women equal access to the preventive services that allow them to be full participants in society. In interfering with that access, the IFR targets women for adverse treatment, resulting in health insurance that covers preventive care that men need, but not care that women need. It interferes with the right to contraception encompassed by the fundamental constitutional right to liberty. And it violates Section 1557 of the ACA, which prohibits discrimination on the basis of sex in "any health program or activity, any part of which is receiving Federal financial assistance . . . or under any program or activity that is administered by an Executive Agency."[12]

Freedom of religion and belief is a fundamental right, protected by our Constitution and federal law. It guarantees us all the right to believe (or not) as we see fit. But it doesn't give anyone the right to use religious or moral beliefs as an excuse to harm others. The Constitution commands that a religious or moral accommodation must be "measured so that it does not override other significant interests" or "impose unjustified burdens on other[s]."[13] In fact, in *Hobby Lobby* under the Religious Freedom Restoration Act, the Court described that the impact of the accommodation on third parties would be "precisely zero."[14] Prior to this IFR, HHS met this requirement by ensuring employees continued to receive no-cost contraception coverage, even if their employer objected to providing coverage. The IFR fails the constitutional do-no-harm test.

Final Statements

As the nation's health policy center, the Department of Health and Human Services (HHS) policies and activities must be firmly based on scientifically valid and appropriate terms and evidence. Instead, the Departments make several false and misleading statements in this Rule to undermine the contraceptive benefit. Furthermore, the IFR prioritizes the religious and moral beliefs of individuals and employers over evidence-based medical recommendations.

The Moral Exemptions IFR undermines the objective of the ACA's contraceptive coverage provision, the Departments past efforts, and prior judicial decisions by allowing an employer's personal beliefs to

---

[9] *See*, e.g., at 21 https://www.aclu.org/sites/default/files/field_document/02.17.16_amicus_brief_in_support_of_respondents-_aclu_et_al.pdf
[10] *Id.* at 19.
[11] *Id.* at 24-27
[12] 2 U.S.C. § 18116.
[13] E.g., Cutter v. Wilkinson, 544 U.S. 709, 722, 726 (2005).
[14] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered. *See id* at 2781 n.37.; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

supersede a woman's access to reproductive health care and her freedom to make decisions regarding her own reproductive health.

The Academy unequivocally opposes the Departments' effort to undermine the contraceptive coverage requirement based on individual's and employer beliefs. The Academy urges HHS to remain religiously and morally neutral in its funding, policies, and activities to ensure that individuals do not feel proselytized by providers or receive a limited scope of services due to the moral or religious nature of an organization.

Sincerely,

Cheryl Sullivan
AAN CEO