ASIAN AMERICAN JUSTICE CENTER
MEMBER OF ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE

ASIAN PACIFIC AMERICAN LEGAL CENTER
MEMBER OF ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE

April 8, 2013

VIA ELECTRONIC SUBMISSION: www.regulations.gov

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-9968-P
P.O. Box 8013
Baltimore, MD 21244-1850

Re: Comments on Proposed Rule—Coverage of Certain Preventive Services Under the Affordable Care Act

On behalf of the Asian American Justice Center and the Asian Pacific American Legal Center, members of the Asian American Center for Advancing Justice, we submit the following comments pursuant to the request for public comment regarding the proposed rule, Certain Preventive Services Under the Affordable Care Act (ACA), 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590 & 45 C.F.R. pts. 147, 148 & 156). Our organizations are dedicated to promoting a fair and equitable society for all by working for civil and human rights and empowering Asian Americans, Native Hawaiians and Pacific Islanders (Asian Americans and NHPIs), and other underserved communities. We provide the growing Asian American and NHPI communities with multilingual support and culturally appropriate legal services, community education, and public policy and civil rights advocacy.

The proposed rule announces the Departments of Treasury, Labor, and Health and Human Services' (collectively, "the Departments'") proposals for changing the definition of a "religious employer" for purposes of an exemption, and implementing the "accommodation" for eligible organizations that object to coverage of contraceptive services—as required by the ACA—for religious reasons. We oppose the Departments' decision to create an exception for certain religious employers and believe that accommodation is unnecessary. These provisions undermine the intention of both the ACA and the Women's Health Amendment, and the ACA does not allow for any limitations regarding contraceptive coverage. Moreover, sections 1554 and 1557 of the ACA actually prohibit the exemption of religious employers from covering preventive services.

Although both the exemption and the accommodation are not required by law, we offer comments on the questions raised in the proposed rule in order to ensure that the Departments structure both the exemption and the accommodation in a seamless way that does not unfairly disadvantage those individuals subject to it or harm their health.

In addition to our recommendations below, we also support the detailed comments submitted by the National Women's Law Center.

I. Definition of "Religious Employers" Exemption

We believe that the Departments' change to the exemption for religious employers "would not expand the universe of employer plans that would qualify for the exemption."[1] In addition, we commend the Departments for proposing that each employer in any multiple employer plan must independently satisfy the requirements of the exemption. However, the women who get health insurance coverage through exempted entities will not receive contraceptive coverage without cost sharing. Therefore, we strongly urge the Departments to completely eliminate the exemption, and instead apply the accommodation to those entities that would fall under the exemption. Only this solution ensures that all women, no matter where they work, will have seamless access to contraceptive coverage.

II. Definition of "Eligible Organization" for the Accommodation

We understand that the Departments have proposed a four-part test for determining which organizations are eligible for the accommodation.

- We strongly support the Departments' decision to limit the accommodation to non-profits. For-profit businesses exist to make money through commercial activity. Their purpose is profit, not religious exercise and should be subject to the same requirements as other for-profit businesses.
- We strongly oppose the Departments' decision to offer the accommodation to organizations that refuse to cover only some contraceptives. It does not make sense to create distinctions between types of contraceptives, especially if they are scientifically proven to be effective and medically safe. This refusal is based on an inaccurate characterization of certain contraceptives and could create confusion and practical difficulties with implementation.
- The Departments must ensure that only organizations that prominently and consistently hold themselves out to the public, their employees, and students as religious may take advantage of the accommodation.
- The Departments must ensure that the self-certification process is robust and transparent, including by requiring eligible organizations to file the self-certifications of eligibility with the Departments.

Overall, we strongly urge the Departments to ensure that the four-part test is narrowly applied and fully enforced, to minimize its negative impact so that as few women as possible are affected by it.

III. Implementation of the Accommodation

The Departments have offered different proposals for implementing the accommodation. We urge the Departments to implement the accommodation so that women receive seamless access

[1] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, at 8461 (proposed Feb. 6, 2013).

to contraceptive coverage. Increased access to contraception is a matter of public health, as contraception advances women's and their families' health and lives. Contraception should not be stigmatized by isolating it from other coverage or services, nor should barriers be created to make accessing this care more difficult. Any other result would undermine Congress's determination that coverage of recommended preventive services without cost sharing is necessary to achieve basic health coverage for more Americans, and, in particular, to remedy discrimination against women in health care. Treating access to contraceptive coverage differently from other preventive services disparately impacts access to women's health care and such discrimination treatment should be minimized if not prohibited.

To that end, the Departments must:

- Clearly state in the rule that if the contraceptive coverage is not in place at the start of the plan year, the eligible organization will not be accommodated that year;
- Ensure that participants and beneficiaries subject to the accommodation receive timely, accurate, and clear notice about their contraceptive coverage without cost-sharing;
- Require that insurers and third-party administrators (TPAs) provide participants and beneficiaries with a single insurance card for both their employer-sponsored plan and their contraceptive coverage;
- Ensure that women in plans that are accommodated have the same legal protections as those in non-accommodated plans; and
- Ensure that issuers providing the contraceptive coverage under the accommodation comply with the requirements of section 2713 of the Public Health Service Act and its implementing regulations and guidance.

Additionally, if the Departments move forward with the contraceptive-only policy as an excepted benefit, the Departments must ensure that all relevant protections apply, such as direct access to OB-GYN providers and HIPAA privacy and disclosure.

With respect to the mechanism through which self-insured plans will be accommodated, the Departments must implement the accommodation so that women receive seamless access to contraceptive coverage. The Departments must state that:

- It is a legal requirement that TPAs find issuers of the contraceptive coverage for "eligible organizations" with which they contract;
- Where an "eligible organization" shifts its legal responsibility to provide contraceptive coverage to TPAs and issuers, the TPAs and issuers take on the legal obligations of the employers as well; and,
- If an "eligible organization" does not have a third-party to provide coverage to its employees, it cannot be accommodated.

If the Departments proceed with their plan of adjusting the Federally-Facilitated Exchange user fees for issuers, we strongly urge that the Departments do so in a way that does not undermine any aspect of the Exchanges. Moreover, we urge the Departments to identify alternative sources of funding for issuers in the event that the Exchange user fees become an inadequate source. And as a matter of principle, it is unacceptable to take money that has been assessed for the specific

purpose of ensuring that millions of Americans have access to health care coverage, and use it instead to underwrite the religious beliefs of the "eligible organizations."

IV. Notice of Availability of Contraceptive Coverage

A. Both employers and issuers should provide participants and beneficiaries with notice.

We urge the Departments to require both employers and issuers to provide written notice to plan participants and beneficiaries regarding the availability of any separate contraceptive coverage. The proposed rule would require only issuers to provide such written notice. Requiring employers and issuers to notify participants and beneficiaries that contraceptive coverage would be administered by a separate health plan would be the clearest way to communicate to them why their contraceptive coverage is being administered separately, thereby preventing confusion and delay in this information. The notices should include complete information about the rights of participants and beneficiaries to receive contraceptive coverage if their employers are accommodated institutions.

B. Notices should be translated into non-English languages for limited-English proficient participants and beneficiaries.

We recommend that the Departments require notices regarding separate individual contraceptive coverage to be translated into non-English languages for limited-English proficient (LEP) participants and beneficiaries. For many Asian American and NHPI women, the difference between accessing and not accessing vital health care services is the availability of culturally and linguistically appropriate care, including the provision of translated documents. Asian Americans and NHPIs are the fastest growing major racial groups in the United States.[2] Approximately 71% of Asian Americans speak a language other than English at home.[3] Approximately 32% of Asian Americans are LEP and experience some difficulty communicating in English.[4] Approximately 21% of Asian American households are linguistically isolated, meaning that all members 14 years old and older speak English less than "very well"[5] and could be considered LEP.[6]

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[2] "Between 2000 and 2010, the Asian American population grew faster than another other racial group, at a rate of 46%." KARTHICK RAMAKRISHNAN, UNIVERSITY OF CALIFORNIA RIVERSIDE & TAEKU LEE, UNIVERSITY OF CALIFORNIA BERKELEY, PUBLIC OPINION OF A GROWING ELECTORATE: ASIAN AMERICANS AND PACIFIC ISLANDERS IN 2012, NATIONAL ASIAN AMERICAN SURVEY 3 (2012), http://naasurvey.com/resources/Home/NAAS12-sep25-election.pdf.

[3] ASIAN PACIFIC AMERICAN LEGAL CTR. (APALC) & ASIAN AMERICAN JUSTICE CTR. (AAJC), MEMBERS OF ASIAN AMERICAN CTR. FOR ADVANCING JUSTICE, A COMMUNITY OF CONTRASTS ASIAN AMERICANS IN THE UNITED STATES: 2011, at 25 (2011), *available at* http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf.

[4] *Id.* at 27.

[5] *Id.* at 29.

[6] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, at 47,313 (Aug. 8, 2003) ("Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English may be limited English proficient, or 'LEP,' and maybe eligible to receive language assistance with respect to a particular type of service, benefit, or encounter.").

The provision of linguistically appropriate services for LEP individuals is critical to achieving the goal of section 2713 of the Public Health Service Act to "enhance coverage of important preventive services for women without cost sharing while accommodating the religious objections to contraceptive coverage of eligible organizations."[7] While many ethnic groups within the Asian American and NHPI population have higher uninsurance rates than the average population, Asian Americans and NHPIs in the aggregate rely heavily on private insurance.[8] Consistently, as reported by the Department of Labor, "people of Asian descent have the lowest unemployment rates compared to other groups, while unemployment among [NHPIs] is higher than that of whites, but lower than that faced by Hispanics and blacks."[9]

Enhanced coverage of contraceptive services will significantly impact Asian American and NHPI women. Already, Asian American and NHPI women face many barriers in accessing reproductive and sexual health services, in part from lack of information, in part misinformation, and in part cultural stigma. Notices from both health insurance issuers and employers about the availability of contraceptive services at no cost to participants and beneficiaries will play a large part in removing the stigma of using these services. Of all major races, Asian women have the lowest rate of ever using any "highly effective, reversible contraceptive method" at 63%, compared to 91% by Non-Hispanic whites, 86% by Non-Hispanic blacks, and 82% of U.S.-born Hispanics.[10] In another study, "researchers concluded that language barriers exacerbated misconceptions that Vietnamese American women had about birth control pills, and prevented them from receiving accurate information about the range of contraceptive options."[11] The severe under-utilization of contraceptive services by Asian American women stresses the importance of removing barriers to access at all points of the healthcare system, including communications about insurance coverage.

We urge the Departments to require employers and health insurance issuers to provide translated notices by drawing from the translation requirements already in place in federally funded programs. Federal law requires health care providers to take affirmative steps to ensure access to services pursuant to prohibitions against discrimination on the basis of national origin, which includes a person's language or inability to speak and understand English proficiently.[12] The

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[7] 78 Fed. Reg. at 8460.

[8] More than one in five Pakistani, Bangladeshi, Korean, and Cambodian Americans are uninsured. At the same time, approximately 74% of Asian Americans under the age of 65 have private health insurance, and only 10% have Medicaid coverage. APALC & AAJC, COMMUNITY OF CONTRASTS at 49.

[9] U.S. DEP'T OF LABOR, THE ASIAN AMERICAN LABOR FORCE IN THE RECOVERY 2 (2011), http://www.dol.gov/_sec/media/reports/AsianLaborForce/AsianLaborForce.pdf.

[10] KIMBERLY DANIELS, WILLIAM D. MOSHER & JO JONES, DIVISION OF VITAL STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, CONTRACEPTIVE METHODS WOMEN HAVE EVER USED: UNITED STATES: 1982–2010, AT 6 (2013), http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf.

[11] NAT'L ASIAN PACIFIC AM. WOMEN'S FORUM, EMERGENCY CONTRACEPTION & ASIAN & PACIFIC ISLANDER WOMEN (updated 2007), at 5–6, http://napawf.org/wp-content/uploads/2009/working/pdfs/issuebrief_ec_updated.pdf.

[12] *See Federal Protections Against National Origin Discrimination*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/publications/natorigin2.php (last visited Dec. 16, 2012) ("Laws prohibiting national origin discrimination make it illegal to discriminate because of a person's birthplace, ancestry, culture or *language*. This means people cannot be denied equal opportunity because they or their family are from another country, because they have a name or accent associated with a national origin group, because they participate in certain customs associated with a national origin group, or because they are married to or associate with people of a certain national origin.").

Departments have all issued their own guidance regarding the enforcement of Title VI of the Civil Rights Act of 1964 as it affects LEP persons ("LEP Guidances").[13] The LEP Guidances use "safe harbors" to recommend vital documents to be translated when 5% or 1000 of the population residing in a service area is LEP.[14] However, the Department of Labor uses a more realistic and ideal threshold for when summaries of health plans and benefits (within pension plans) need to be translated for employees—a 500-person numeric threshold.[15] Therefore, the notices of contraceptive coverage should be provided in the non-English languages of those who make up more than **5% or 500** of an employer's participant and beneficiary count. If there are fewer than 50 persons in a language group that reach the 5% trigger in the "safe harbor," the employer and issuer can provide written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of the notices if they are not translated.[16] Lastly, all notices should display "taglines" in the top 15 languages of the state to inform participants and beneficiaries that translated materials and interpreter services may be available.[17]

C. Notice of accommodation should be provided with mandatory standard language at the same time as when employers typically provide insurance information to their employees and their beneficiaries.

The Departments have requested comments on "ways to improve the proposed model language, the timing and delivery (including electronically) of the notice to plan participants and beneficiaries, and whether this notice requirement could be combined with other existing notice requirements to simplify administration for issuers."[18] We recommend that employers use standard form language in providing notice of cost-free contraceptive coverage—and not be given the option to use "substantially similar" language. Having a standard form notice

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[13] U.S. DEP'T OF HEALTH & HUMAN SERVS., Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311 (proposed Aug. 4, 2003); *available at* http://www.gpo.gov/fdsys/pkg/FR-2003-08-08/pdf/03-20179.pdf; U.S. DEP'T OF LABOR, Civil Rights Center; Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons; Notice, 68 Fed. Reg. 32,290 (proposed May 29, 2003), *available at* http://www.dol.gov/oasam/regs/fedreg/notices/2003013125.pdf; U.S. DEP'T OF TREASURY, Guidance of Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 70 Fed. Reg. 6067 (proposed Feb. 4, 2005), *available at* http://www.gpo.gov/fdsys/pkg/FR-2005-02-04/pdf/05-2156.pdf.

[14] U.S. DEP'T OF HEALTH & HUMAN SERVS., Title VI Guidance, 68 Fed. Reg. at 47,319; U.S. DEP'T OF LABOR, Title VI Guidance, 67 Fed. Reg. at 32,290– 91; U.S. DEP'T OF TREASURY, Title VI Guidance, 70 Fed. Reg. at 6074.

[15] Style and Format of Summary Plan Description, 29 C.F.R. § 2520.102-2(c)(2) (2012) ("A plan which covers 100 or more participants at the beginning of the plan year, and in which the lesser of (i) 500 or more participants, or (ii) 10% or more of all plan participants are literate only in the same non-English language . . . .").

[16] U.S. DEP'T OF HEALTH & HUMAN SERVS., 68 Fed. Reg. 47,311, at 47,319; U.S. DEP'T OF LABOR, 68 Fed. Reg. at 32,290, at 32,290–91; U.S. DEP'T OF TREASURY, 68 Fed. Reg. 47,311, at 47,419.

[17] The request for 15 languages is based on existing government practice. The Social Security Administration, through its Multilanguage Gateway, translates many of its documents into 15 languages. *See Multilanguage Gateway*, U.S. SOCIAL SECURITY ADMINISTRATION (Oct. 2012), http://www.ssa.gov/multilanguage. Additionally, the Centers for Medicare and Medicaid Services translates Medicare forms, including notices, into 15 languages in addition to Spanish. *See* CTR. FOR MEDICARE & MEDICAID SERVS., CMS STRATEGIC LANGUAGE ACCESS PLAN (LAP) (2010), http://www.cms.gov/About-CMS/Agency-Information/EEOInfo/downloads/AnnualLanguageAccessAssessmentOutcomeReport.pdf.

[18] 78 Fed. Reg. at 8464.

minimizes the risk of having gaps in information from employers who are already adverse or reluctant to provide their employees with contraceptive coverage; this would ensure that women will receive the same uniform and accurate information.

We reiterate the following amendments suggested by the National Women's Law Center to the proposed standard language to clearly convey that participants and beneficiaries will receive coverage, but that such coverage will not be available through group health plans or student health insurance. As discussed in Section IV.B. above, notices must be translated for LEP participants and beneficiaries.

> **The organization that establishes and maintains, or arranges, your health cove**rage ["the organization"] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. ***As a result, you and any covered dependents will be enrolled in a separate individual health insurance policy that provides contraceptive coverage at no additional cost to you.*** *The separate policy will be arranged by [if fully insured insert name of issuer; if self-insured insert name of TPA].* ~~This means that y~~Your health coverage *provided by the organization* will not cover the following contraceptive services: [contraceptive services specified in self-certification]. Instead, these contraceptive services will be covered through ~~a~~ *the* separate individual health insurance policy, which is not administered or funded by, or connected in any way to, your health coverage *provided by the organization*. ~~You and any covered dependents will be enrolled in this separate individual health insurance policy at no additional cost to you.~~ If you have any questions about this notice, contact [contact information for health insurance issuer] or *visit our website at www.____.com*.

Additionally, as suggested by the National Women's Law Center, we also recommend that the Departments should require eligible organizations to provide their employees and beneficiaries with written notices whenever and however they provide other insurance information to them, including both when they first become enrolled in the plan at the start of their employment and prior to each plan year. Similarly, health insurance issuers and TPAs should be required to use meaningful ways to communicate to participants and beneficiaries that their plans provide cost-free contraceptive coverage, including providing language assistance services, such as oral interpreter services or written translation services. These notices should be provided when insurance cards are issued after enrollment and also on their websites.

V. Additional Issues

We strongly support the Departments' statement that "the provisions of these proposed rules would not prevent states from enacting stronger consumer protections than these minimum standards."[19] State health insurance laws requiring coverage for contraceptive services that

[19] Coverage of Certain Preventive Services, 78 Fed. Reg. 8456, at 8468.

provide more access to contraceptive coverage than the federal standards would therefore continue under the proposed rules.

The Departments must clarify that other existing legal obligations specifically requiring contraceptive coverage, such as those arising from Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, continue to apply to those organizations that are exempted or accommodated.

Finally, the Departments must provide enforcement and oversight of the preventive services requirement overall, and of the religious employer exemption and the accommodation in particular.

In summary, in order to fulfill the promise of the preventive services provision of the health care law, women who are subject to an accommodation must have the same seamless access to no-cost contraceptive coverage as those who are not.

Thank for the opportunity to comment on the proposed rule. If you have questions about these comments, please contact Helen Tran, NAPABA Law Foundation Partners and In-House Counsel Community Law Fellow, at (202) 296-2300 ext. 108 or htran@advancingequality.org.

Sincerely,

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