



AMERICAN BENEFITS COUNCIL

October 21, 2014

Submitted via the Federal Regulations Web Portal, <http://www.regulations.gov>

The Honorable Sylvia M. Burwell
Secretary of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Thomas E. Perez
Secretary of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

The Honorable Jacob J. Lew
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Comments on Coverage of Certain Preventive Services under the Affordable Care Act, Proposed Rule: CMS-9940-P

Dear Secretaries Burwell, Perez and Lew:

I write on behalf of the American Benefits Council (the “Council”) to provide comments on proposed rules (“Proposed Rules”) to change the definition of an eligible organization that can avail itself of an accommodation with respect to coverage of certain preventive services under section 2713 of the Public Health Service Act (PHS Act), added by the Patient Protection and Affordable Care Act (“the ACA”), as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code. The Proposed Rules were published in the Federal Register on August 27, 2014 (79 Fed. Reg. 51118) by the Department of the Treasury, Department of Labor and Department of Health and Human Services (collectively, “the Departments”).

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We appreciate the opportunity to comment on the proposed approaches for defining a qualifying “closely-held for profit entity” for purposes of an accommodation with respect to requirements to provide contraceptive coverage where such entities establish religious objections to providing such coverage. As discussed below, the Council supports clarification so that plan sponsors and third party administrators (“TPAs”) will be able to clearly determine eligibility for the accommodation.

PROPOSED APPROACHES FOR DEFINING A QUALIFYING CLOSELY HELD FOR-PROFIT ENTITY

The Departments propose to amend the definition of “eligible organization” in the Departments’ contraceptive coverage regulations in light of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* Generally, under the new preventive services requirement under the ACA, non-grandfathered group health plans and group health insurance must provide certain preventive services to participants without cost sharing. Included in the required preventive services are certain contraceptive services as set out under Health Resources and Services Administration (HRSA) guidelines for women’s health services.

Under current regulations implementing the contraceptive services requirement, the self-funded and insured group health plans of certain religious employers are exempt from the requirement to cover the otherwise required contraceptive services. In addition, the current regulations provide accommodations that permit “eligible organizations” – generally not-for-profit religious organizations – that object to the provision of some or all of the required the contraceptive coverage to avoid providing the coverage through the organization’s group health plan. In such a case, the eligible organization’s TPA or health insurance issuer must provide the contraceptive coverage at no cost to U.S. participants, the eligible organization, or the eligible organization’s group health plan.

On June 30, 2014, the U.S. Supreme Court announced its decision in *Burwell v. Hobby Lobby Stores, Inc.* The Court held that, under the Religious Freedom Restoration Act of 1993, the contraceptive coverage requirement could not be applied to the closely held for-profit corporations before the court, because their owners had religious objections to providing such coverage. The Court further suggested that the eligible organization religious accommodation under existing regulations might be a less-restrictive, and therefore permissible, exercise of federal authority.

In response, the Departments have proposed to expand the definition of “eligible organization” under the current rules to include closely held for-profit corporations, and have asked for comments, in particular, on how to define a qualifying closely held for-profit entity.

DEFINITION SHOULD BE CLEAR AND EASILY ADMINISTRABLE

The Council supports clarifying when a closely held for-profit entity is an “eligible organization” and thus may avail itself of the accommodation as permitted under regulations. Employers, health insurance carriers and third-party administrators will need clarity as to who can claim an accommodation and for determining related compliance obligations. As a result, we believe that any approach for defining a “closely held for-profit entity” for the purpose of amending the definition of “eligible organization” should be simple and straightforward.

Given the need for a clear rule, we recommend that the definition of “closely held for-profit entity” adopted in any future guidance be one that is commonly understood. For example, the Internal Revenue Code already defines a closely held corporation as an entity that “[a]t any time during the last half of the taxable year more than 50 percent in value of its outstanding stock is owned, directly or indirectly, by or for not more than 5 individuals.” 26 USC § 542(a)(2), cross-referenced in the Itemized Deductions for Individuals and Corporations provision, 26 USC § 170. Similarly, the IRS’s website¹ says that a “plain English” definition of a closely held corporation is “Generally, ... a corporation that:

- Has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year; and
- Is not a personal service corporation.”

See also Internal Revenue Code’s Publication, Corporations, Pub. 542 (closely-held as (1) not a personal service corporation and (2) “[a]t any time during the last half of the tax year, more than 50% of the value of its outstanding stock is, directly or indirectly, owned by or for five or fewer individuals. ‘Individual’ includes certain trusts and private foundations.”) This definition is similar to the second, alternative approach outlined in the proposed Regulation.

We believe that selecting a commonly understood definition will help to ensure that entities are able to accurately identify when they may meet the requirements to be considered an “eligible organization” for purposes of the accommodation.

¹ Available at <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5>.

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Thank you for the opportunity to comment on the Proposed Regulations and for considering our suggested recommendations. If you have any questions or would like to discuss these comments further, please contact me at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Kathryn Wilber". The signature is written in a cursive, flowing style.

Kathryn Wilber
Senior Counsel, Health Policy