

United States Senate

WASHINGTON, DC 20510

December 21, 2017

The Honorable Eric Hargan
Acting Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

The Honorable Steven Mnuchin
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Acting Secretary Hargan, Secretary Acosta, and Secretary Mnuchin,

We are writing today to request information on how your Departments plan to address the critical health and economic issues highlighted in the public comments on the recent interim final rules undermining birth control coverage under the Affordable Care Act (ACA) for millions of women nationwide. To fully address these issues, we believe that your Departments should rescind the interim final rules in their entirety and consider implementing policies that expand, rather than retract, access to reproductive health care.

The ACA requires employer-provided insurance plans to cover preventive health services, including a set of specific preventive health services for women, without a co-pay for consumers.¹ Women's preventive services, as defined by the Health Resources and Services Administration (HRSA), include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures."² Certain religious employers, such as churches and other houses of worship, are exempt from providing contraceptive coverage should they oppose it. In

¹ Kaiser Family Foundation, "Preventive Services Covered by Private Health Plans under the Affordable Care Act" (August 4, 2015) (online at <https://www.kff.org/health-reform/fact-sheet/preventive-services-covered-by-private-health-plans/#footnote-160040-1>); Alison Kodjak, "Trump Guts Requirement That Employer Health Plans Pay for Birth Control," *National Public Radio* (October 6, 2017) (online at <https://www.npr.org/sections/health-shots/2017/10/06/555970210/trump-ends-requirement-that-employer-health-plans-pay-for-birth-control>).

² Health Resources & Services Administration, "Women's Preventive Services Guidelines" (last updated December 20, 2016) (online at <https://www.hrsa.gov/womens-guidelines/index.html>).

2013, the Obama Administration developed an additional religious accommodation for religiously-affiliated non-profit organizations, while still ensuring that women have access to contraceptive coverage without a co-pay through their insurers.³

The ACA requires insurers to cover birth control for good reason. In addition to preventing unwanted pregnancies and reducing abortion rates⁴, contraception provides significant health benefits. Birth control can treat medical conditions like endometriosis, polycystic ovary syndrome (PCOS), dysmenorrhea, migraines, and acne.⁵ Furthermore, contraception has economic benefits: women who use it achieve greater educational and professional attainment than women who don't.⁶ Without the influx of women to the workforce since 1970—a trend made possible, to a large degree, by the availability of effective birth control—the nation's GDP would be only three-quarters the size it is today.⁷ Prior to the passage of the ACA, some women struggled to afford birth control, and co-payments as little as \$6 often deterred them from accessing preventive health services. Thanks to the ACA, millions of women gained access to co-pay-free contraceptive coverage.⁸

However, in October 2017, your Departments issued a set of interim final rules (IFRs) that have significantly weakened the contraceptive requirements of the ACA.⁹ Taken together, the IFRs—*Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*¹⁰ and *Moral Exemptions and Accommodations for*

³ Centers for Medicare & Medicaid Services, The Center for Consumer Information & Insurance Oversight, "Women's Preventive Services Coverage and Non-Profit Religious Organizations" (online at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html>).

⁴ Joerg Dreweke, "New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy Is Driving Recent Abortion Declines," *Guttmacher Institute* (March 18, 2016) (online at <https://www.guttmacher.org/gpr/2016/03/new-clarity-us-abortion-debate-steep-drop-unintended-pregnancy-driving-recent-abortion>).

⁵ Rachel K. Jones, "Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills," *Guttmacher Institute* (November 2011) (online at <https://www.guttmacher.org/report/beyond-birth-control-overlooked-benefits-oral-contraceptive-pills>).

⁶ Claudia Goldin and Lawrence F. Katz, "The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions," *Journal of Political Economy* (2002) (online at https://dash.harvard.edu/bitstream/handle/1/2624453/goldin_powerpill.pdf?sequence=4); National Women's Law Center, "Fact Sheet: Reproductive Health is Part of the Economic Health and Women and Their Families" (February 2015) (online at https://www.nwlc.org/sites/default/files/pdfs/reproductive_health_is_part_of_the_economic_health_of_women_2.18_v2pdf.pdf).

⁷ McKinsey & Company, "Women in the economy: Selected exhibits" (April 2011) (online at file:///C:/Users/ss42246/Downloads/WomenEconomy_Exhibits_V3_10282011.pdf).

⁸ National Women's Law Center, "The Affordable Care Act's Birth Control Benefit Is Working for Women" (online at <https://nwlc.org/resources/the-affordable-care-acts-birth-control-benefit-is-working-for-women/>).

⁹ Robert Pear, Rebecca R. Ruiz, and Laurie Goodstein, "Trump Administration Rolls Back Birth Control Mandate," *New York Times* (October 6, 2017) (online at <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>).

¹⁰ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (October 13, 2017) (online at <https://www.federalregister.gov/documents/2017/10/13/2017-21851/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the>).

*Coverage of Certain Preventive Services Under the Affordable Care Act*¹¹—establish a set of sweeping exemptions to the ACA’s contraceptive mandate that effectively render birth control coverage optional for objecting employers and universities. The new IFRs permit employers and universities to claim broad religious or moral exemptions to covering birth control. They also make the religious accommodation process voluntary—placing the birth control coverage of over 62.4 million American women at risk.¹² Because your Departments chose to issue a set of interim final rules, the birth control IFRs went into effect immediately after being published in the Federal Register. But agencies may alter IFRs “if warranted by public comments.”¹³ Both birth control IFRs were open for public comment until December 5, 2017.¹⁴

Last Friday, a federal court temporarily halted the enforcement of these IFRs, asserting—as we do—that they unnecessarily “intrude[]...into the lives of women.”¹⁵ In halting the enforcement, the Court described “the potential harm faced by...women...across the nation” as a result of the IFRs as “enormous and irreversible.”¹⁶ The Court asserted that no law or statutory construction permits your Departments to issue such broad exemptions to the ACA’s preventive services requirements, and that the decision to issue interim final rules, bypassing the notice and comment period, was not justified in this case.

The use of contraception as a form of basic reproductive health care is a decision that must be made by individual women in consultation with their doctors—not a decision to be made by a woman’s employer or university. Women use birth control to plan whether and when to have kids, prevent sexually transmitted infections, and treat medical conditions. An employer or university’s views on contraception and judgements about its use should not inhibit their employee’s ability to make basic health decisions.

¹¹ Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (October 13, 2017) (online at <https://www.federalregister.gov/documents/2017/10/13/2017-21852/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable>).

¹² Robert Pear, Rebecca R. Ruiz, and Laurie Goodstein, “Trump Administration Rolls Back Birth Control Mandate,” *New York Times* (October 6, 2017) (online at <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>); National Women’s Law Center, “New Data Estimate 62.4 Million Women Have Coverage of Birth Control without Out-of-Pocket Costs” (online at <https://nwlc.org/resources/new-data-estimate-62-4-million-women-have-coverage-of-birth-control-without-out-of-pocket-costs/>).

¹³ Office of the Federal Register, “A Guide to the Rulemaking Process” (online at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

¹⁴ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (October 13, 2017) (online at <https://www.federalregister.gov/documents/2017/10/13/2017-21851/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the>); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (October 13, 2017) (online at <https://www.federalregister.gov/documents/2017/10/13/2017-21852/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable>).

¹⁵ Robert Pear, “Court Temporarily Blocks Trump Order Against Contraceptive Coverage,” *New York Times* (December 15, 2017) (online at <https://www.nytimes.com/2017/12/15/us/politics/obamacare-birth-control-trump.html>).

¹⁶ See *Commonwealth of Pennsylvania v. Donald J. Trump, Donald J. Wright, United States Department of Health and Human Services, Steven T. Mnuchin, United States Department of the Treasury, Rene Alexander Acosta and the United States Department of Labor* (No. 17-4540) (filed December 15, 2017) (online at <https://assets.documentcloud.org/documents/4329962/COMMONWEALTH-of-PENNSYLVANIA-v-TRUMP-Et-Al.pdf>).

The vast majority of the comments submitted to your Departments share our opposition to the IFRs: over 500,000 commenters expressed their opposition to the Department of Health and Human Services alone, with thousands more writing in to the Departments of Labor and Treasury.¹⁷ In addition to expressing general opposition to a proposal that limited women’s control over their reproductive decisions, these commenters repeatedly expressed their concerns that the birth control IFRs threaten women’s access to the economic and health benefits of birth control coverage.

Economic Benefits of Birth Control

Many of the comments submitted in opposition to the IFRs highlighted the economic security that access to co-pay free birth control provides. Some commenters noted that without insurance coverage, they would not be able to afford birth control—let alone a child. “I am a public school teacher,” said one commenter. “\$960 a year [for birth control] would be an enormous strain on my budget, and my husband and I certainly cannot afford a child if we can’t afford birth control!”¹⁸

Other commenters shared stories highlighting how contraceptive coverage allowed them to get and keep jobs—ensuring their economic stability and that of their families and partners. According to one “tax paying, voting woman happily married and gainfully employed for 15 years,” getting an intrauterine device (IUD) “covered by [her] insurance” allowed her to “continue working and paying taxes” because she was “not incapacitated every month by extreme cramps and blood loss.”¹⁹ Other commenters noted:

- “I am a Registered Nurse and in my final semester of my Masters in Nursing program to become a Family Nurse Practitioner. My husband and I would not be able to handle a child today or in the near future while I pursue my career, and birth control keeps me as a productive member of society... Taking away birth control protections is a huge mistake for someone who claims to want a better economy.”²⁰
- “My birth control pills, which I need to ease horrific symptoms from excruciating endometriosis, actually costs \$100-\$125 per month without co-pay free insurance for birth control. That’s actually about \$1500 a year, which I cannot afford out of pocket... Birth control is necessary for millions of women for many many reasons, and no politician... [has] the right to take that away from us.”²¹
- “I am a 28 year old graduate student. My husband is also a grad student. We are not yet ready to have kids because we want to finish our education before starting a family.

¹⁷ Planned Parenthood, “More than Half a Million Comments Submitted to HHS in Opposition to Attacks on Birth Control Coverage” (December 5, 2017); Amanda Michelle Gomez, “Hands off my birth control’: 500,000 personal objections to one Trump administration policy,” *Think Progress* (December 5, 2017) (online at <https://thinkprogress.org/birth-control-mandate-317d52d45d38/>).

¹⁸ <https://www.regulations.gov/document?D=IRS-2017-0016-4153>

¹⁹ <https://www.regulations.gov/document?D=IRS-2017-0016-8084>

²⁰ <https://www.regulations.gov/document?D=CMS-2014-0115-21580>

²¹ <https://www.regulations.gov/document?D=IRS-2017-0016-4810>

Please Keep Birth Control [co-pay] Free. The extra monthly cost will just dig us further into credit card debt, as our student loans don't even cover our living costs as it is."²²

- “Please protect copay-free birth control! As a college student working two jobs just to support myself in this messed up economy...I wouldn't be able to pay for let alone continue to get Birth Control without it being co-pay free. That would mean every month I would be in such [excruciating] pain, I would be able to leave my bed...That would affect my life, I only make [\$]25000 a year working two jobs pulling an average of 60-70 hours a week; and being bed ridden for a week every month would put me on the street, because I use birth control to regulate my periods...”²³
- “I am a medical student, and will become a fully-fledged physician by next year. Medical school has been an extremely exciting time in my life, and I have given all of my time and energy in pursuit of my education. I would not have been able to reach this point in my career if I had to worry about taking care of children. My husband and I relied on an affordable, long acting reversible contraceptive (LARC) to prevent us from getting pregnant, and compromising our careers during a time when the two of us are not financial nor professionally ready for children.”²⁴
- “Please maintain coverage for birth control without religious exemptions or accommodations. Birth control allows a woman to continue working and being a provider. There are many single parents out there who rely on birth control to [e]nsure that they can take care of their family. Please understand that women are already at a disadvantage in the workplace with unpaid maternity leave...and lower wages overall.”²⁵

These commenters' arguments about access to birth control offering the opportunity for economic, educational, and professional attainment are supported by data, which show that access to contraception provides educational and professional opportunities for women and their families.²⁶

Health Benefits of Birth Control

In addition, many commenters shared women's personal experiences using contraception to prevent pregnancy and to address debilitating medical conditions. “I was just diagnosed with endometriosis,” says one commenter, “meaning that my uterine tissue lining migrated outside my uterus and attached itself to something else... That lining still bleeds every month, but because there's nowhere for the blood to go, it just sits there and causes swelling and pain. My symptoms can be managed with birth control, but only if I can afford it.”²⁷ Another commenter, a sufferer

²² <https://www.regulations.gov/document?D=CMS-2014-0115-20680>

²³ <https://www.regulations.gov/document?D=IRS-2017-0016-1061>

²⁴ <https://www.regulations.gov/document?D=IRS-2017-0015-5771>

²⁵ <https://www.regulations.gov/document?D=IRS-2017-0016-9569>

²⁶ Adam Sonfield, Kinsey Hasstedt, Megan L. Kavanaugh and Ragnar Anderson, “The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children,” *The Guttmacher Institute* (March 2013) (online at https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf).

²⁷ <https://www.regulations.gov/document?D=IRS-2017-0016-0736>

of “period cramps so painful they made [her] vomit” who relies on hormonal contraception “to live [her] life normally,” expressed anger that the federal government would make it easier for employers to deny her “this medication”: “This is the kind of basic healthcare this proposed regulation [the IFRs] will allow my employer to specifically deny me...How is it their right to interfere with my healthcare?”²⁸ These commenters are far from alone. For example:

- “I have taken oral contraceptives from the age of 17; I began taking them not for their contraceptive effects (though my husband and I are very grateful for those effects...), but for a chronic condition called Poly-cystic Ovary Syndrome, a medical conditions that causes [a] myriad [of] problems if untreated. Medical professionals agree that hormonal contraceptives, including oral contraceptives, are the best and most low-maintenance, low-cost, non-invasive way to treat PCOS.”²⁹
- “While I understand why people want to make this a moral debate...I see this as a women’s healthcare issue. How many women (or girls for that matter) take birth control to manage endometriosis or fibroids? [...] Isn’t the morally right thing to do to ensure she has continued access to [co-pay] free birth control?”³⁰
- “[B]irth control isn’t just for preventing unplanned pregnancies, it also helps millions of women from experiencing infertility through the progression of endometriosis.”³¹
- “PLEASE FOR THE LOV[E] OF GOD help me keep my birth control. I am not sure what my father’s employers’ beliefs are on birth control but I do know that the birth control I am currently taking is the ONLY birth control which treats my endometriosis effectively without having crazy side effects. I am in excruciating pain if [I’m] not on this medication and I can only imagine how awful it would be for someone to lose their birth control just because their employer is ignorant [of] the fact that birth control doesn’t just prevent birth.”³²
- “I doubt anyone reading this care at all...But on the off chance that someone does, I’d like them to know that I was not prescribed birth control by my doctor to keep from getting pregnant. I use it because I have Polycystic Ovarian Syndrome. I have a LOT of cysts on my ovaries. When I get my period, if the cysts are not being controlled, they burst and explode in my abdomen. It hurts more than I can tell you. Imagine being kicked in the stomach at random with muscle spasms so intense that someone else literally can feel them externally. I also bleed so heavily during my period that I can’t leave my house because congealed blood is coming out of me and I am in such pain I can barely move...Birth control helps me with these things. It regulates my period. It makes it lighter and easier to control.”³³

²⁸ <https://www.regulations.gov/document?D=IRS-2017-0016-8137>

²⁹ <https://www.regulations.gov/document?D=IRS-2017-0016-3264>

³⁰ <https://www.regulations.gov/document?D=CMS-2017-0133-4923>

³¹ <https://www.regulations.gov/document?D=CMS-2014-0115-21614>

³² <https://www.regulations.gov/document?D=CMS-2014-0115-23227>

³³ <https://www.regulations.gov/document?D=IRS-2017-0016-0836>

- “I have required oral contraceptives for recurrent and complicated ovarian cysts for 17 years. Without this vital treatment it is likely I would have needed multiple surgeries by now which would have likely resulted in my ovaries being removed, destroying my fertility and even possibly killing me in the process. Before ACA I had to pay upwards of \$50 a month for this life saving medication, at times this was beyond my means and I had to go off the medication...This is wrong and this rule should be thrown in the trash where it belongs.”³⁴
- “As someone with PCOS, a hormonal disorder that causes my ovaries to create cysts rather than eggs that potentially turn into cancerous tumors, birth control is essential to my treatment.”³⁵
- “Contrary to your belief, many women in this country take birth control for MEDICAL reasons...I, personally, have a severe case of PCOS, and would die from either cancer, heart disease, or depression if I didn’t have access to it.”³⁶
- “My wife has used birth control for over 12 years to combat the occurrence of ovarian cysts. This rule change stands to be potentially fiscally and physically costly to millions of women, and I am not in support.”³⁷
- “I have used the depo [Depo Provera] shot since I was 20 or 21. I started fainting and blacking out unfortunately usually in public. Ever since I started my depo shot I haven’t fainted since...This medication helps me in more ways than one.”³⁸

As these commenters point out, by allowing employers to categorically oppose covering birth control due to “religious” and “moral” opposition, the IFRs reduce women’s ability to access critical health care.

Questions

As many of us noted in a comment letter on the IFRs, we believe that it is in the best interest of women and their families for you rescind the existing IFRs in their entirety.³⁹ The overwhelming opposition to the birth control IFRs expressed during the public comment period suggest that, in addition to rescinding the IFRs, your Departments should take steps to implement policies that expand Americans’ access to contraception. Therefore, we request that you answer the following questions no later than January 5, 2018:

³⁴ <https://www.regulations.gov/document?D=CMS-2014-0115-13796>

³⁵ <https://www.regulations.gov/document?D=IRS-2017-0016-0810>

³⁶ <https://www.regulations.gov/document?D=IRS-2017-0015-0787>

³⁷ <https://www.regulations.gov/document?D=IRS-2017-0016-9868>


³⁸ <https://www.regulations.gov/document?D=CMS-2014-0115-19372>

³⁹ Letter from Senators Murray, Blumenthal, et al., to Acting Secretary Eric. D. Hargan (December 5, 2017).


1. Numerous commenters highlight the critical preventive health benefits that contraception provides but that may be inaccessible to employees who cannot access co-pay free birth control. What steps do the Departments of Health and Human Services, Labor, and Treasury plan to take to ensure that women can access—and afford—the health care they need, regardless of their employers' or universities' personal beliefs about contraception?
2. Numerous commenters highlight the economic, professional, and educational stability that access to co-pay free birth control provides them. What steps do the Departments of Health and Human Services, Labor, and Treasury plan to take to ensure that women are not limited in their educational and economic opportunities by their employers' and universities' personal beliefs regarding contraceptives?
3. Since studies have shown that federal economic investment in family planning services leads to exponentially larger savings to taxpayers, have your Departments conducted—or do they plan to conduct—a cost-benefit analysis to taxpayers for implementing policies like those outlined in the IFRs? Will the Departments commit to conducting such a cost-benefit analysis, if one has not been completed already?

Please do not hesitate to reach out to Susannah Savage of Senator Warren's staff at 202-224-4543 or Laurel Sakai of Senator Murray's staff at 202-224-6403 with any questions or concerns.

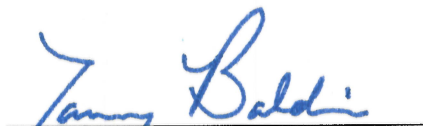
Sincerely,



Elizabeth Warren
United States Senator




Patty Murray
United States Senator



Tammy Baldwin
United States Senator



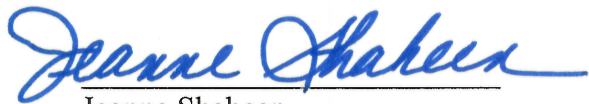
Sheldon Whitehouse
United States Senator



Kirsten Gillibrand
United States Senator



Richard Blumenthal
United States Senator



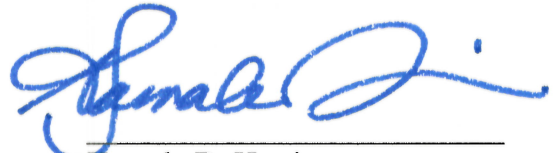
Jeanne Shaheen
United States Senator



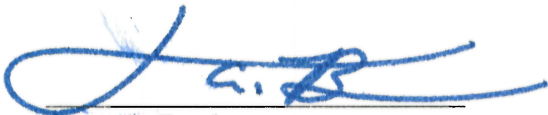
Sherrod Brown
United States Senator



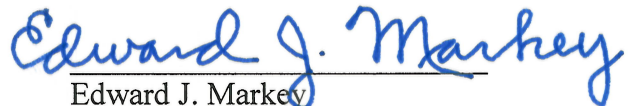
Mazie Hirono
United States Senator



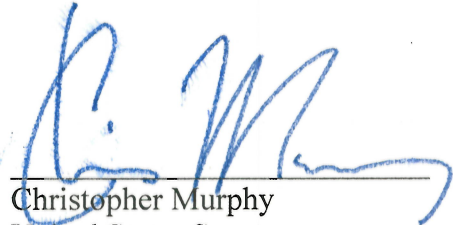
Kamala D. Harris
United States Senator



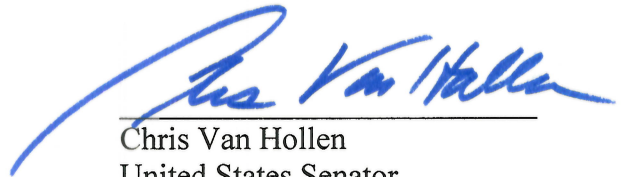
Cory A. Booker
United States Senator



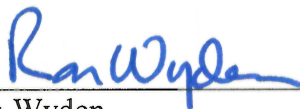
Edward J. Markey
United States Senator



Christopher Murphy
United States Senator



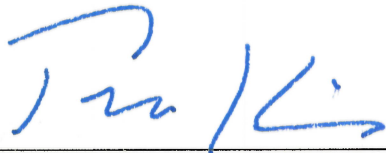
Chris Van Hollen
United States Senator



Ron Wyden
United States Senator



Jack Reed
United States Senator



Tim Kaine
United States Senator



Al Franken
United States Senator