CEA
Christian Employers Alliance

Uniting for Impact

April 3, 2023

The Honorable Danny Werfel
Commissioner
Internal Revenue Service
Department of the Treasury
1111 Constitution Avenue, Northwest
Washington, D.C. 20224

The Honorable Julie A. Su
Acting Secretary of Labor
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard Baltimore, MD 21244

Re: Coverage of Certain Preventive Services Under the Affordable Care Act
[Docket ID: REG 124930-21]
[Docket ID: CMS-9903-P]
[RIN: 0938-A94; 1210-AC13; 1545-BQ35]

Dear Commissioner Werfel, Acting Secretary Su, and Administrator Brooks-LaSure:

Christian Employers Alliance is a Christian membership ministry that exists to unite and serve Christian non-profit and for-profit employers who wish to live out their faith in every-day life, including their homes, schools, ministries, businesses, and communities. CEA's members do not check their faith at the door of their for-profit businesses and non-profit organizations. Every day, our members try to live out the Apostle Paul's admonition, "whether you eat or drink or whatever you do, do it all for the glory of God," 1 Corinthians 10:31, while they "take every thought captive to make it obedient to Christ," 2 Corinthians 10:5.

Relevant here, CEA's members follow Christian teachings on the sanctity of human life from conception through natural death. These beliefs are anchored in biblical texts, including Psalm 139:13, which says, "For you created my inmost being; you knit me together in my mother's womb. I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. My frame was not hidden from you when I was made in the secret place, when I was woven together in the depths of the earth. Your eyes saw my unformed body; all the days ordained for me were written in your book before one of them came to be." The *Didache*, an early Christian code of conduct dated by some scholars as early as 70 AD prohibits "abort[ion] [of] a foetus or kill[ing] a child that is born." As a district court which enjoined the federal government from enforcing a contraception mandate against our organization explained, CEA members "view abortifacients as contrary to their religious beliefs." *Christian Employers Alliance v. Azar*, Case No. 3:16-cv-00309-DLH-ARS, ECF No. 53, at 2 (D.N.D. May 15, 2019).

Under our organization's bylaws, CEA members also "commit to provide health care benefits consistent with Christian Ethical Convictions and to support the right and freedom of Christian employers to do so." While our members cannot, in good conscience, perform or otherwise refer out for performance of abortions, CEA members also object to paying for or otherwise subsidizing abortion. CEA members have thus considered the "difficult and important question" of "the circumstances under which it is wrong for a person to perform an act that is innocent in itself," i.e., paying health insurance premiums, "but that has the effect of enabling or facilitating the commission of an immoral act by another," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014), and our members have concluded they cannot perform, approve of, or facilitate abortion in any way without violating their sincerely-held Christian beliefs. Relevant here, as one federal district court recognized in analyzing the Departments' contraception mandate, "[s]ome FDA approved contraceptives prevent a fertilized egg from implanting in the mother's uterus rather than preventing conception," which CEA and its members view as "abortifacients or abortion-causing drugs." *Christian Employers Alliance*, ECF No. 53, at 2.

CEA has several concerns with the proposed Coverage of Certain Preventive Services Under the Affordable Care Act rule (the "Proposed Rule").

The Departments should clarify that there is no obligation to inform employees about the availability of the proposed "individual contraceptive arrangement."

The Departments' contraceptive mandate has engendered significant litigation. The Departments purport "to resolve the long-running litigation with respect to religious objections to providing contraceptive coverage, by respecting the objecting entities' religious objections while also

ensuring that women enrolled in plans or coverage sponsored, arranged, or provided by objecting entities have the opportunity to obtain contraceptive services at no cost." 88 Fed. Reg. 7236, 7243 (Feb. 2, 2023).

The Departments propose to create an "individual contraceptive arrangement," which they describe as an "independent pathway through which women enrolled in plans or coverage sponsored, arranged, or provided by objecting entities can access contraceptive services at no cost." *Id.* The Departments promise that "[t]his individual contraceptive arrangement would be available to the participant, beneficiary, or enrollee *without the plan sponsor or issuer having to take any action* that would facilitate the coverage to which it objects." *Id.* (emphasis added). All relevant action, under this proposal, "is undertaken by the individual, for the individual." *Id.*

The relevant proposed regulatory text does not contain these assurances. *See id.* at 7278 (proposed 45 C.F.R. § 147.131(d)). We ask the Departments to add such an assurance in the regulatory text if it finalizes the proposed "individual contraceptive arrangement." This is not academic for CEA's members. Supporters of the individual contraceptive arrangement have suggested that the Departments require entities to inform employees about the availability of abortifacients through the program.

Any accommodation of this request or similar requests by the Departments to require entities to inform employees of the availability of the individual contraceptive arrangement would be unacceptable. Not only would a disclosure mandate violate the Departments' promise that conscientious objectors to the contraceptive mandate would not have to "take any action," 88 Fed. Reg. at 7243, but it would violate the Religious Freedom Restoration Act and the First Amendment, both on free exercise and on free speech grounds. In any final rule, we ask the Departments to clarify in the regulatory text that nothing will be construed to require objecting entities or persons from having to disclose anything about the individual contraceptive arrangement or making any other statements regarding the availability of abortifacients to employees.

The Departments failed to consider federalism implications in the Proposed Rule.

One of the express purposes of the Proposed Rule is to "further the [federal] government's interests in promoting coverage for contraceptive services for all women." *Id.* at 7242. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), there are ongoing efforts at the state level to protect life and prohibit abortion in many circumstances. These efforts include abortion pills and could extend to abortifacients. *See* Jacqueline Quynh, *Florida warns pharmacies to not fill prescriptions for abortion pills*, CBS News, Jan. 17, 2023,

https://www.cbsnews.com/miami/news/florida-agency-for-healthcare-administration-warns-pharmacies-to-not-give-out-abortion-pills. Despite the ongoing debate over abortion in the states, the Departments claim that they "do not anticipate that these proposed rules would have any federalism implications or limit the policy making discretion of the states." 88 Fed. Reg. at 7271.

The Proposed Rule would have a direct impact on the ability of the States to govern themselves. Without an exemption, employers covered by the Proposed Rule would have to provide coverage of abortifacients. Presumably, the Departments would require those employers to comply with the Proposed Rule, even if governing state law banned abortifacients. Assuming that is the case, the Proposed Rule would prevent States from regulating employers' facilitation of abortifacients, undermining *Dobbs* promise to "return the issue of abortion to the people's elected representatives." *Id.* at 2243. Indeed, this appears to be by design—it is the Departments' express goal of "[e]nsuring access to contraception at no cost . . . *particularly in states with prohibitions or tight restrictions on abortion.*" 88 Fed. Reg. at 7241 (emphasis added). Any final rule should not preempt state laws protecting life in the womb. CEA members should be able to fully enjoy the benefits and protections of any such state laws.

Conclusion

For these reasons and more, CEA objects to the Proposed Rule and asks the Departments to withdraw its proposal, or at a minimum, make the modifications suggested above.

Respectfully,

Shannon O. Royce, J.D.
President
Christian Employers Alliance