

## Proposed Regulations Released on Contraceptive Coverage Exemption and Accommodation for Nonprofit Religious Employers

On January 30, the Departments of Treasury, Labor, and Health and Human Services (the “Departments”) released [proposed regulations](#) regarding contraceptive coverage for employees of religious employers. This guidance is the latest in a series of guidance and proposals from the Departments on the requirement under the Affordable Care Act (ACA) that issuers and group health plans offer contraceptive coverage without cost-sharing. While the proposed rules modestly expand the categories of religious employers that may be exempted entirely from the contraceptive coverage requirement or that may be eligible for an accommodation under which they would not be required to provide contraceptive coverage directly, for the most part, the proposed rules reflect a continuation of existing policies.

### Background

Under federal guidelines implementing the ACA’s requirement that group health plans and health insurance issuers cover preventative services for participants without cost sharing, group health plans and health insurance issuers must provide participants access to all FDA-approved contraceptives, sterilization, and reproductive counseling for women (“contraceptive coverage requirement”). This requirement was generally effective for plan years beginning on or after August 1, 2012. After considerable debate, however, the Departments issued final rules in February 2012 that exempted a limited category of religious institutions from the contraceptive coverage requirement. The exemption in the final rules covered only institutions that qualify under a provision of the Internal Revenue Code as nonprofit churches, associations of churches or religious orders, primarily employ and serve members of the same faith, and have a primary purpose of inculcating religious values. This standard excluded many church-affiliated organizations, such as certain charities, hospitals and universities whose mission is not primarily religious and that are open to, and employ, members of the public generally. In order to further consider the application of the contraceptive coverage requirement to these institutions, the Department of Health and Human Services (HHS) simultaneously announced a one-year moratorium on enforcement of the requirement against employers that self-certify that they are nonprofit entities that object to the contraceptive coverage requirement on religious grounds and notify participants that they will not be providing contraceptive services.

As the next step in the guidance process, in March 2012, the Departments provided an advanced notice of proposed rule making (the “March 2012 Notice”) indicating an intent to use a three-prong test to determine whether an employer was an “eligible organization.” Eligible organizations would still be subject to the contraceptive coverage requirement, but would be provided with an accommodation under which they would not be required to directly provide or pay for contraceptive coverage. Instead, under the Departments’ proposal, the insurer or, in the case of self-insured plans, the third-party administrator would provide a separate stand-alone contraceptive policy that would not be funded by the employer. To qualify as an “eligible organization,” an employer would be required to self-certify that it is a nonprofit, religious organization that has a bona fide religious objection to covering contraceptives. The March 2012 Notice requested comments on a number of issues, including how best to determine whether an employer would be considered “religious” for this purpose.

### The Proposed Rules

The proposed rules are generally consistent with the standard in the February 2012 final rules for organizations exempt from the contraceptive coverage requirement and the proposal in the March 2012 Notice for organizations eligible for an accommodation, but do modestly relax the requirements to be considered an

exempt institution or eligible institution. With respect to exempt institutions, the proposed rules eliminate the requirements that exempt institutions have the purpose of inculcating religious values and employ and serve primarily members of the same faith. This represents an effort to ensure that, for example, a religious institution that does charitable outreach without respect to the religious faith of recipients or a parochial school that employs people of different religious faiths could still qualify for the exemption. The proposed rules continue to limit the exemption to those institutions that are churches, their integrated auxiliaries, or church conventions or associations, or that conduct the exclusively religious activities of a religious order. Therefore, the proposed exemption remains narrow and will not generally allow entities such as universities or hospitals to qualify for the exemption.

With respect to nonprofit religious organizations that are not exempted, the proposed rules would allow employers considerable leeway to determine whether they should qualify as eligible for the proposed accommodation on contraceptives. Rather than requiring a nonprofit employer to meet a specific definition of “religious,” the proposed regulations require only that the employer hold itself out as a religious organization and declare a bona fide religious objection to the rule. Organizations would be required to self-certify that they meet these criteria. Consistent with previous guidance, student health insurance coverage arranged by a nonprofit educational institution would be eligible for the accommodation if the institution meets the requirements.

The details of the proposed accommodation for eligible organizations are likewise consistent with earlier guidance, although additional details and proposals are provided with respect to how eligible organizations would be permitted to avoid paying for contraceptive coverage. An eligible organization that sponsors a fully-insured plan would provide a self-certification to its health insurance issuer, which would be required to provide separate contraceptive-only policies to participating employees. An eligible organization that sponsors a self-insured plan would provide a copy of its self-certification to its third party administrator (including any pharmacy benefits manager), which would then automatically arrange separate contraceptive-only policies for participating employees. In the self-insured context, the Departments continue to explore how to ensure such a separate plan would be funded other than by the sponsoring employer and have proposed three methods. Under one approach, a third-party administrator would be compensated for automatically arranging for the contraceptive-only policies through payment by the issuer of the policies, providing an economic incentive for the administrator to voluntarily arrange for the contraceptive-only coverage. Under a second approach, the third-party administrator would arrange for an issuer to assume sole responsibility for providing the separate contraceptive-only policies without charge to plan participants and beneficiaries, the eligible organization, or its plan. Under the third approach, the third-party administrator would be directly responsible for automatically arranging for the contraceptive-only policies.

The proposed rules create a new category of HIPAA excepted health benefits that would exempt contraceptive-only policies from many federal health care regulations, but that would still compel such policies to comply with a core set of basic consumer protection requirements generally applicable to individual health insurance policies.

None of the guidance provided on the contraceptive coverage requirement to date contemplates any exemption or accommodation for any type of for-profit employers. Litigation challenging the contraceptive coverage requirement brought by both eligible organizations and for-profit employers continues in several federal courts, and this guidance is unlikely to affect most cases.

The deadline for comment on the proposed rules is April 8, 2013. Please contact your Ropes & Gray attorney if you have questions.