United States Senate
WASHINGTON, DC 20510

September 20, 2016

The Honorable Sylvia Burwell
Department of Health and Human Services
Centers for Medicare and Medicaid Services
Attention: CMS-9931-NC
P.O. Box 8010
Baltimore, MD 21244-1850

Re: CMS–9931–NC; Coverage for Contraceptive Services

Dear Secretary Burwell,

We write in response to the Request for Information (RFI) published by the Departments of Health and Human Services, Labor, and Treasury (Departments) regarding the Affordable Care Act's (ACA) contraception coverage benefit. As Members of Congress and strong supporters of efforts to increase access to affordable birth control, we believe that the legislative history of the ACA makes clear that the law's contraceptive coverage benefit, and the current accommodation, advance Congress's goal of promoting public health and equality for women.[1]

The legislative history of the ACA clearly demonstrates that Congress viewed the provisions for women's preventive care benefits and services, including contraceptive coverage, as critical to fulfilling Congress's goals of ensuring complete coverage of preventive care, better health for women, women's equality in the workplace, and ending discrimination against women in health care. As such, Congress adopted the Women's Health Amendment, proposed by Senator Barbara Mikulski, which included critically important preventive services for women in the ACA.

In crafting the ACA, Congress took a comprehensive approach to improving access to health care for women. The goal was to fill gaps in women's existing preventive services by expanding access to a broader array of preventive benefits at little or no cost to women. Congress understood that cost-free preventive health care services for women, including contraception, would decrease maternal mortality, reduce unintended pregnancies and pregnancy related complications, and also protect children's health and well-being by ensuring that women become pregnant when they are healthy and able to care for their child.[2] Congress recognized that "[w]omen are more likely than men to neglect care or treatment because of cost."[3] The high out-of-pocket costs for health care, especially reproductive health care, resulted in many women not having access to necessary services.[4] The Women's Health Amendment therefore required that

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[1] A significant proportion of the Members of Congress submitting this RFI also outlined substantially similar arguments in an *amicus* brief submitted to the U.S. Supreme Court in support of birth control policy. *See* Brief of 123 Members of the United States Congress as *Amici Curiae* In Support of Respondents, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), *at* https://www.franken.senate.gov/files/docs/160217AmicusBrief.pdf.

[2] *See, e.g.*, 155 CONG. REC. S12026 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski) ("We know early detection saves lives, curtails the expansion of disease, and, in the long run, saves money."); *id.* at S12052 (statement of Sen. Franken) ("These screenings catch potential problems such as cancer as early as possible. . . . For example, cervical cancer screenings every 3 to 5 years could prevent four out of every five cases of invasive cancer.").

[3] 155 CONG. REC. S11987 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("Fourteen percent of women report they delay or go without needed health care. Women of childbearing age incur 68 percent more out-of-pocket health care costs than men . . . .").

[4] *See* 155 CONG. REC. S12269 (daily ed. Dec. 3, 2009) (statement of Sen. Mikulski) ("[C]opayments are so high that [women] avoid getting [preventive and screening services] in the first place."); 155 CONG. REC. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("[T]oo many women are delaying or skipping preventive care because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost.").

group health plans include preventive health care services for women without cost-sharing, so that women and men would have equal access to the full range of health care services for their specific health needs, including contraception.[5]

The benefits afforded in the ACA are based on the Institute of Medicine (IOM) evaluation and recommendations that the full range of women's preventive services, including contraceptive methods and counseling, were necessary for women's health and well-being.[6] IOM found that the high cost of contraception meant that women often decided not to use those services or had to rely on less effective methods, because "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM advised that the elimination of cost-sharing for these contraceptive benefits for women would increase the use of more effective methods and ensure more consistent use which improves women's health outcomes. Based on IOM's review and recommendations, the Departments ultimately recommended coverage of the full range of contraceptive methods approved by the U.S. Food and Drug Administration, effectuating Congress's intent to provide affordable coverage for contraceptive benefits and services to advance women's health.

The ACA and its Implementing Regulations are Fulfilling Congress's Goal of Improving Women's Health

Since the passage of the ACA, inequities in health care for women have been declining. The ACA improved access to health care coverage for an estimated 65 million women with pre-existing conditions,[7] and, as of June 2016, over 55 million women are benefiting from preventive services with no out-of-pocket cost.[8]

A critical component of this improvement in women's health care is cost-free contraceptive coverage, which has resulted in dramatic savings for millions of women. According to a study published in the journal *Health Affairs*, "[b]efore the [requirement's] implementation, out-of-pocket expenses for contraceptives for women using them represented a significant portion (30-44 percent) of these women's total out-of-pocket health care spending."[9] After the law's implementation, the median out-of-pocket per prescription cost dropped to zero for almost all contraceptives, suggesting that the majority of women no longer faced out-of-pocket costs for contraception—as intended by the ACA. The study showed an estimated savings of $255 annually per person in out-of-pocket costs for oral contraceptives. In addition, the ACA has eliminated the high up-front costs of long-acting reversible contraceptive methods, which previously may have deterred women from using them. These figures show that the ACA has been successful in reducing the cost of contraception for women and highlight the critical importance of protecting access for future generations.

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[5] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,887.
[6] *See* Clinical Preventive Services for Women: Closing the Gaps (IOM Report).
[7] *See* Adelle Simmons, Katherine Warren, & Kellyann McClain, ASPE Issue Brief, *The Affordable Care Act: Advancing the Health of Women and Children* 1 (Jan. 9, 2015) (hereinafter ASPE Issue Brief), https://aspe.hhs.gov/pdf-report/affordable-care-act-advancing-health-women-and-children (last visited Sept. 9, 2016) (since 2013, the uninsured rate among women ages 18 to 64 declined 5.5 percentage points).
[8] ASPE Issue Brief: The Affordable Care Act: Promoting Better Health for Women 1 (June 14. 2016) https://aspe.hhs.gov/sites/default/files/pdf/205066/ACAWomenHealthIssueBrief.pdf (last visited Sept. 12, 2016).
[9] See Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 HEALTH AFFAIRS 1204, 1208 (July 2015).

The ACA and its Implementing Regulations Appropriately Balance the Need to Ensure Cost-Free Coverage for Women While Accommodating Religious Exercise

The original contraception accommodation was designed to permit eligible nonprofit religious organizations to opt out of the coverage requirement on the basis of religious objections, while ensuring that employees who do not share their employer's religious beliefs about contraception could still obtain coverage from their health insurance.[10] Under this accommodation, eligible nonprofit organizations are not required to "contract, arrange, pay, or refer for contraceptive coverage," but plan participants and beneficiaries still receive coverage without cost-sharing. It represents a balance of Congress' intent, in women receiving seamless preventive benefits and services, while also allowing certain organizations to forgo participation in the provision of contraceptive coverage.

A recent study conducted by the Kaiser Family Foundation estimated that as many as 1 in 10 large nonprofits with more than 1,000 employees have elected and used the religious accommodation.[11] The expansion of the religious accommodation to include for-profit employers increases the number of women who must rely on it to ensure coverage they are guaranteed under the ACA. The government must thus have a functional system to ensure that women employees from these businesses have access to the contraceptive services that Congress intended. In our view, this statutory and regulatory scheme represents the least restrictive means of furthering the government's compelling interests in women's health and in combating discrimination by ensuring that women still have access to this cost-free coverage, while protecting employers' rights to religious freedom.

Some have proposed that women whose employers will not provide contraceptive coverage obtain such coverage through government programs or that the responsibility be shifted from the employer and the federal government to the women employees. Such a proposal would leave women without the seamless access to coverage Congress intended. The ACA requires coverage of preventive services through the existing employer-based system of health insurance "so that women face minimal logistical and administrative obstacles."[12] Requiring women "to take steps to learn about, and to sign up for, a new health benefit" would impede women's receipt of benefits, countering Congress's intent.[13] The Departments specifically explained that "[c]onsistent with the statutory objective of promoting access to contraceptive coverage and other preventive services without cost sharing, plan beneficiaries and enrollees should not be required to incur additional costs—financial or otherwise—to receive access and thus should not be required to enroll in new programs or to surmount other hurdles to receive access to coverage."[14] We agree.

The unavailability or inadequacy of contraceptive coverage not only fails to promote women's health but also creates a two-tiered system, one for women and one for everyone else that "places

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[10] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,874.
[11] *See* Laurie Sobel, Matthew Rae & Alina Salganicoff, Kaiser Family Found., *Data Note: Are Nonprofits Requesting an Accommodation for Contraceptive Coverage?* 2 (Dec. 2015).
[12] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,888.
[13] *Id.*; *cf. Hobby Lobby*, 134 S.Ct. at 2783 (if religious employers drop health insurance coverage, employees would be required to find individual plans on government-run exchanges or elsewhere which is "scarcely what Congress contemplated" (citations omitted)).
[14] Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,328.

women in the workforce at a disadvantage compared to their male co-workers."[15] Such proposals would require women take additional steps and potentially incur greater expense, to obtain an important part of their coverage elsewhere, when their male counterparts are not required to take such steps to obtain the full coverage mandated for them—the very result that the ACA was intended to prevent.

In light of the Supreme Court's decision in *Zubik v. Burwell* to vacate and remand cases challenging the accommodation to the courts of appeals,[16] we appreciate the Departments' efforts to seek input on the question of whether or how to alter the accommodation. However, in our view, the current accommodation not only accurately represents Congress's clear intent to provide for contraceptive coverage in the ACA, but also appropriately balances the need to ensure women's access to birth control while protecting employers' rights to religious freedom. We, the undersigned, strongly support the accommodation in its current form and urge the Departments not to modify the policy.

Sincerely,

Al Franken
United States Senator

Patty Murray
United States Senator

Richard J. Durbin
United States Senator

Charles E. Schumer
United States Senator

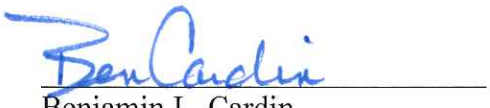
Edward J. Markey
United States Senator

Kirsten Gillibrand
United States Senator

Sherrod Brown
United States Senator

Jeanne Shaheen
United States Senator

[15] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,728.
[16] 136 S.Ct. 1557 (2016).

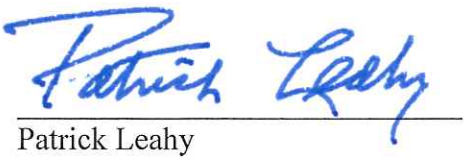


Benjamin L. Cardin
United States Senator

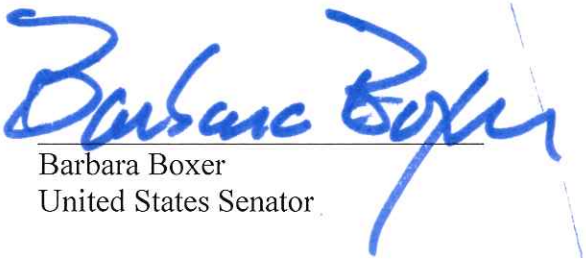
Richard Blumenthal
United States Senator

Bernard Sanders
United States Senator

Sheldon Whitehouse
United States Senator



Patrick Leahy
United States Senator



Barbara Boxer
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Barbara A. Mikulski
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Thomas R. Carper
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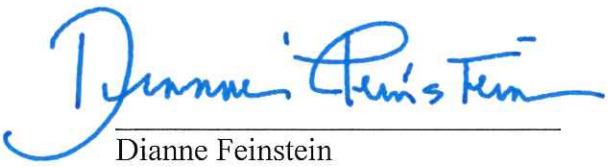
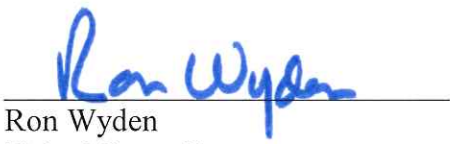
Christopher S. Murphy
United States Senator

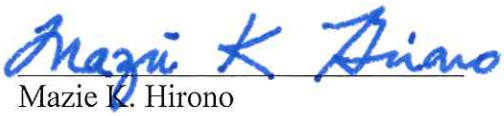


Dianne Feinstein
United States Senator

Tammy Baldwin
United States Senator



Ron Wyden
United States Senator



Mazie K. Hirono
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Debbie Stabenow
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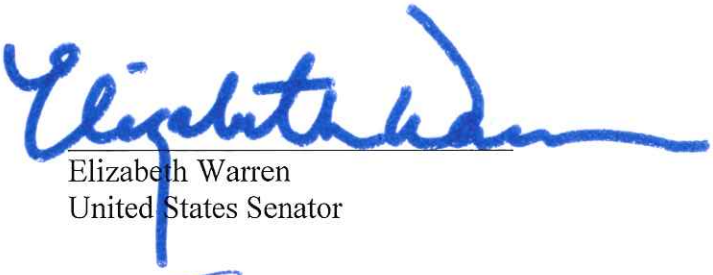

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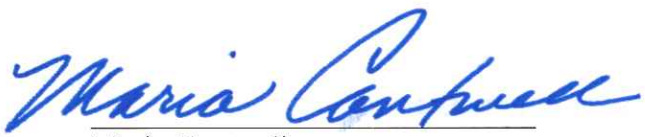
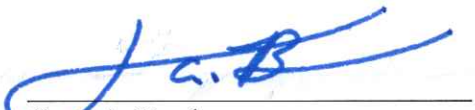


Maria Cantwell
United States Senator



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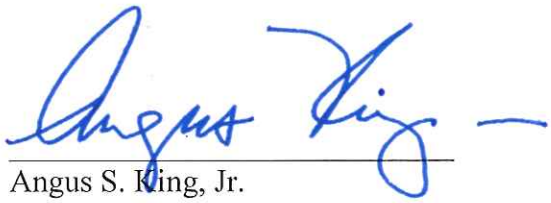
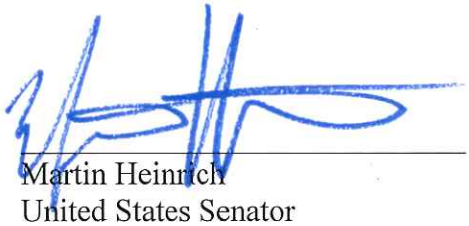


Angus S. King, Jr.
United States Senator



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Robert Menendez
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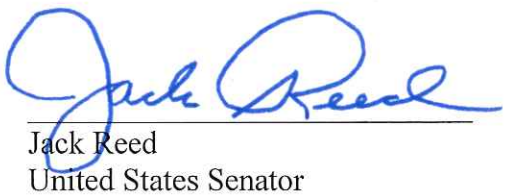
Michael F. Bennet
United States Senator



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Amy Klobuchar
United States Senator

Jon Tester
United States Senator