

# INTERNAL REVENUE BULLETIN



## HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

### Administrative

#### **Announcement 2018–15, page 1020.**

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. These individuals are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Part 10, and which are published in pamphlet form as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.

#### **Rev. Proc. 2018–58, page 990.**

This procedure provides an updated list of time-sensitive acts, the performance of which may be postponed under sections 7508 and 7508A of the Internal Revenue Code. Section 7508 postpones specified acts for individuals serving in the Armed Forces of the United States or serving in support of such Armed Forces in a combat zone or serving with respect to a contingency operation (as defined in 10 U.S.C. § 101(a)(13)). Section 7508A permits a postponement of the time to perform specified acts for taxpayers affected by a federally declared disaster or a terroristic or military action. The list of acts in this revenue procedure supplements the list of postponed acts in section 7508(a)(1) and § 301.7508A–1(c)(1)(vii) of the Procedure and Administration Regulations. Rev. Proc. 2007–56 superseded.

### Employee Plans

#### **NOTICE 2018–86, page 982.**

This notice sets forth updates on the corporate bond monthly yield curve, the corresponding spot segment rates for November

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2018 used under § 417(e)(3)(D), the 24-month average segment rates applicable for November 2018, and the 30-year Treasury rates, as reflected by the application of § 430(h)(2)(C)(iv).

#### **NOTICE 2018–91, page 985.**

This notice contains the 2018 Required Amendments List for individually designed qualified retirement plans. There are no entries listing changes in qualification requirements on the 2018 Required Amendments List.

### Excise Tax

#### **TD 9840, page 851.**

Final regulations under Code section 9815 amend previous regulations added pursuant to the Patient Protection and Affordable Care Act. Section 9815 incorporates by reference sections of the Public Health Service Act (PHS Act), including PHS Act section 2713 concerning the mandatory provision by certain health plans of preventive care, including contraception. This guidance expands exemptions to recognize the religious convictions for entities and individuals who object to the mandate based on religious beliefs and whose health plans are subject to the mandate of contraceptive coverage. It is related to a second set of final regulations that expand moral exemptions and accommodations under that mandate.

#### **TD 9841, page 913.**

Final regulations under Code section 9815 amend previous regulations added pursuant to the Patient Protection and Affordable Care Act. Section 9815 incorporates by reference sections of the Public Health Service Act (PHS Act), including PHS Act section 2713 concerning the mandatory provision by certain health plans of preventive care, including contraception. This guidance expands exemptions to recognize the moral convictions for entities and individuals who object to the mandate based on sincerely held beliefs and whose health plans are subject to the mandate of contraceptive coverage. It

is related to a second set of final regulations that expand religious exemptions and accommodations under that contraceptive mandate.

## **Income Tax**

### **Rev. Proc. 2018–56, page 985.**

This procedure provides the procedures by which a taxpayer may obtain automatic consent of the Commissioner of Internal Revenue to change to certain methods of accounting provided under sections 1.263A–1, -2, and -3, including methods described in T.D. 9843, for costs allocable to certain property produced or acquired for resale by the taxpayer. This revenue procedure modifies Rev. Proc. 2018–31, 2018–22 I.R.B. 637.

### **Rev. Proc. 2018–59, page 1018**

Rev. Proc. 2018–59 provides a safe harbor that allows taxpayers to treat certain infrastructure trades or businesses as real property trades or businesses solely for purposes of qualifying as electing real property trades or businesses under section 163(j)(7)(B) of the Internal Revenue Code. Taxpayers that make an election for an infrastructure trade or business to be an electing real property trade or business under section 163(j)(7)(B) are not subject to the limitation on business interest expense under section 163(j), but must use the alternative depreciation system of section 168(g) to depreciate the property described in section 168(g)(8). This revenue procedure describes the types of infrastructure trades or businesses that can qualify as electing real property trades or businesses.

### **REV. RUL. 2018–31, page 848.**

2018 Base Period T-Bill Rate. The “base period T-bill rate” for the period ending September 30, 2018, is published as required by section 995(f) of the Internal Revenue Code.

### **TD 9843, page 957.**

This document contains final regulations on allocating costs to certain property produced or acquired for resale by a taxpayer. These final regulations: provide rules for the treatment of negative adjustments related to certain costs required to be capitalized to property produced or acquired for resale; provide a new simplified method of accounting for determining the additional costs allocable to property produced or acquired for resale; and redefine how certain types of costs are categorized for purposes of the simplified methods. These final regulations affect taxpayers that are producers or resellers of property that are required to capitalize costs to the property and that elect to allocate costs using a simplified method.

# The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

## Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

### **Part I.—1986 Code.**

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

### **Part II.—Treaties and Tax Legislation.**

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

### **Part III.—Administrative, Procedural, and Miscellaneous.**

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

### **Part IV.—Items of General Interest.**

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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# Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

## Section 995.—Taxation of DISC Income to Shareholders

*2018 Base Period T-Bill Rate. The “base period T-bill rate” for the period ending September 30, 2018, is published as required by section 995(f) of the Internal Revenue Code.*

### Rev. Rul. 2018–31

Section 995(f)(1) of the Internal Revenue Code provides that a shareholder of a domestic international sales corporation (“DISC”) shall pay interest each taxable year in an amount equal to the product of the “shareholder’s DISC-related deferred tax liability” for the year (as defined in section 995(f)(2)) and the “base period T-bill rate.” Under section 995(f)(4), the base period T-bill rate is the annual rate of interest determined by the Secretary to be equivalent to the average of the 1-year constant maturity Treasury yields, as published by the Board of Governors of the Federal Reserve System, for the 1-year period ending on September 30 of the calendar year ending with (or the most recent calendar year ending before) the close of the taxable year of the shareholder.

The base period T-bill rate for the period ending September 30, 2018, is 2.06 percent.

Pursuant to section 6622 of the Internal Revenue Code, interest must be compounded daily. The table below provides factors for compounding the 2018 base period T-bill rate daily for any number of days in the shareholder’s taxable year (including for a 52–53 week accounting period). To compute the amount of the interest charge for the shareholder’s taxable year, multiply the amount of the shareholder’s DISC-related deferred tax liability for that year by the base period T-bill rate factor corresponding to the number of days in the shareholder’s taxable year for which the interest charge is being computed. Generally, one would use the factor for 365 days. One would use a different factor only if the shareholder’s taxable year for which the interest charge is being determined is a short taxable year, if the

shareholder uses a 52–53 week taxable year, or if the shareholder’s taxable year is a leap year.

For the base period T-bill rates for periods ending in prior years, see Rev. Rul. 2017–23, 2017–49 I.R.B. 546; Rev. Rul. 2017–01, 2017–03 I.R.B. 377; Rev. Rul. 2015–26, 2015–49 I.R.B. 696; Rev. Rul. 2014–33, 2014–52 I.R.B. 957; Rev. Rul. 2013–24, 2013–49 I.R.B. 594; Rev. Rul. 2012–22, 2012–48 I.R.B. 565; and Rev. Rul. 2011–30, 2011–49 I.R.B. 826.

### DRAFTING INFORMATION

The principal author of this revenue ruling is Lorraine S. Rodriguez of the Office of Associate Chief Counsel (International). For further information regarding the revenue ruling, contact Ms. Rodriguez at (202) 317-6726 (not a toll-free number).

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
1	0.000056438
2	0.000112880
3	0.000169325
4	0.000225773
5	0.000282224
6	0.000338678
7	0.000395135
8	0.000451596
9	0.000508060
10	0.000564527
11	0.000620997
12	0.000677471
13	0.000733947
14	0.000790427
15	0.000846910
16	0.000903396
17	0.000959885
18	0.001016378
19	0.001072874
20	0.001129373
21	0.001185875
22	0.001242380

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
23	0.001298888
24	0.001355400
25	0.001411915
26	0.001468433
27	0.001524954
28	0.001581479
29	0.001638006
30	0.001694537
31	0.001751071
32	0.001807608
33	0.001864149
34	0.001920692
35	0.001977239
36	0.002033789
37	0.002090342
38	0.002146898
39	0.002203458
40	0.002260021
41	0.002316586
42	0.002373156
43	0.002429728
44	0.002486303
45	0.002542882
46	0.002599464
47	0.002656049
48	0.002712637
49	0.002769229
50	0.002825823
51	0.002882421
52	0.002939022
53	0.002995626
54	0.003052234
55	0.003108844
56	0.003165458
57	0.003222075
58	0.003278695
59	0.003335319
60	0.003391945
61	0.003448575
62	0.003505208
63	0.003561844

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
64	0.003618484
65	0.003675126
66	0.003731772
67	0.003788421
68	0.003845073
69	0.003901729
70	0.003958387
71	0.004015049
72	0.004071714
73	0.004128382
74	0.004185053
75	0.004241728
76	0.004298406
77	0.004355087
78	0.004411771
79	0.004468458
80	0.004525149
81	0.004581843
82	0.004638539
83	0.004695240
84	0.004751943
85	0.004808650
86	0.004865359
87	0.004922072
88	0.004978788
89	0.005035508
90	0.005092230
91	0.005148956
92	0.005205685
93	0.005262417
94	0.005319153
95	0.005375891
96	0.005432633
97	0.005489378
98	0.005546126
99	0.005602877
100	0.005659632
101	0.005716390
102	0.005773151
103	0.005829915
104	0.005886682
105	0.005943453
106	0.006000227
107	0.006057004

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
108	0.006113784
109	0.006170567
110	0.006227354
111	0.006284144
112	0.006340937
113	0.006397733
114	0.006454532
115	0.006511335
116	0.006568141
117	0.006624950
118	0.006681762
119	0.006738578
120	0.006795396
121	0.006852218
122	0.006909043
123	0.006965872
124	0.007022703
125	0.007079538
126	0.007136376
127	0.007193217
128	0.007250061
129	0.007306909
130	0.007363759
131	0.007420613
132	0.007477470
133	0.007534331
134	0.007591194
135	0.007648061
136	0.007704931
137	0.007761804
138	0.007818681
139	0.007875560
140	0.007932443
141	0.007989329
142	0.008046219
143	0.008103111
144	0.008160007
145	0.008216906
146	0.008273808
147	0.008330713
148	0.008387622
149	0.008444533
150	0.008501448
151	0.008558366

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
152	0.008615288
153	0.008672212
154	0.008729140
155	0.008786071
156	0.008843006
157	0.008899943
158	0.008956884
159	0.009013827
160	0.009070775
161	0.009127725
162	0.009184678
163	0.009241635
164	0.009298595
165	0.009355558
166	0.009412525
167	0.009469494
168	0.009526467
169	0.009583443
170	0.009640422
171	0.009697405
172	0.009754390
173	0.009811379
174	0.009868371
175	0.009925367
176	0.009982365
177	0.010039367
178	0.010096372
179	0.010153380
180	0.010210391
181	0.010267406
182	0.010324424
183	0.010381445
184	0.010438469
185	0.010495497
186	0.010552527
187	0.010609561
188	0.010666598
189	0.010723639
190	0.010780682
191	0.010837729
192	0.010894779
193	0.010951832
194	0.011008889
195	0.011065949

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
196	0.011123011
197	0.011180078
198	0.011237147
199	0.011294219
200	0.011351295
201	0.011408374
202	0.011465456
203	0.011522542
204	0.011579631
205	0.011636722
206	0.011693818
207	0.011750916
208	0.011808017
209	0.011865122
210	0.011922230
211	0.011979341
212	0.012036456
213	0.012093574
214	0.012150695
215	0.012207819
216	0.012264946
217	0.012322077
218	0.012379210
219	0.012436347
220	0.012493488
221	0.012550631
222	0.012607778
223	0.012664928
224	0.012722081
225	0.012779237
226	0.012836397
227	0.012893560
228	0.012950726
229	0.013007895
230	0.013065067
231	0.013122243
232	0.013179422
233	0.013236604
234	0.013293790
235	0.013350978
236	0.013408170
237	0.013465365
238	0.013522564
239	0.013579765

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
240	0.013636970
241	0.013694178
242	0.013751389
243	0.013808604
244	0.013865821
245	0.013923042
246	0.013980266
247	0.014037494
248	0.014094724
249	0.014151958
250	0.014209195
251	0.014266436
252	0.014323679
253	0.014380926
254	0.014438176
255	0.014495429
256	0.014552686
257	0.014609945
258	0.014667208
259	0.014724474
260	0.014781744
261	0.014839016
262	0.014896292
263	0.014953571
264	0.015010854
265	0.015068139
266	0.015125428
267	0.015182720
268	0.015240015
269	0.015297314
270	0.015354615
271	0.015411920
272	0.015469228
273	0.015526540
274	0.015583854
275	0.015641172
276	0.015698493
277	0.015755818
278	0.015813145
279	0.015870476
280	0.015927810
281	0.015985148
282	0.016042488
283	0.016099832

ANNUAL RATE, COMPOUNDED DAILY 2.06 PERCENT	
DAYS	FACTOR
284	0.016157179
285	0.016214529
286	0.016271883
287	0.016329239
288	0.016386599
289	0.016443962
290	0.016501329
291	0.016558699
292	0.016616071
293	0.016673448
294	0.016730827
295	0.016788210
296	0.016845595
297	0.016902985
298	0.016960377
299	0.017017772
300	0.017075171
301	0.017132573
302	0.017189979
303	0.017247387
304	0.017304799
305	0.017362214
306	0.017419632
307	0.017477054
308	0.017534478
309	0.017591906
310	0.017649338
311	0.017706772
312	0.017764210
313	0.017821651
314	0.017879095
315	0.017936542
316	0.017993993
317	0.018051447
318	0.018108904
319	0.018166364
320	0.018223828
321	0.018281295
322	0.018338765
323	0.018396238
324	0.018453715
325	0.018511195
326	0.018568678
327	0.018626164



DAYS	ANNUAL RATE, COMPOUNDED DAILY
	2.06 PERCENT FACTOR
328	0.018683654
329	0.018741147
330	0.018798643
331	0.018856142
332	0.018913645
333	0.018971151
334	0.019028660
335	0.019086172
336	0.019143687
337	0.019201206
338	0.019258728
339	0.019316254
340	0.019373782
341	0.019431314
342	0.019488849
343	0.019546387
344	0.019603929
345	0.019661473
346	0.019719021
347	0.019776573
348	0.019834127
349	0.019891685
350	0.019949246
351	0.020006810
352	0.020064378
353	0.020121949
354	0.020179523
355	0.020237100
356	0.020294680
357	0.020352264
358	0.020409851
359	0.020467441
360	0.020525035
361	0.020582632
362	0.020640232
363	0.020697835
364	0.020755441
365	0.020813051
366	0.020870664
367	0.020928280
368	0.020985900
369	0.021043523
370	0.021101149
371	0.021158778

## T.D. 9840

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 54

### DEPARTMENT OF LABOR Employee Benefits Security Administration 29 CFR Part 2590

### DEPARTMENT OF HEALTH AND HUMAN SERVICES 45 CFR Part 147 Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act

**AGENCIES:** Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; and Centers for Medicare & Medicaid Services, Department of Health and Human Services.

**ACTION:** Final rules.

**SUMMARY:** These rules finalize, with changes based on public comments, interim final rules concerning religious exemptions and accommodations regarding coverage of certain preventive services issued in the **Federal Register** on October 13, 2017. These rules expand exemptions to protect religious beliefs for certain entities and individuals whose health plans are subject to a mandate of contraceptive coverage through guidance issued pursuant to the Patient Protection and Affordable Care Act. These rules do not alter the discretion of the Health Resources and Services Administration, a component of the U.S. Department of Health and Human Services, to maintain the guidelines requiring contraceptive coverage where no regulatorily recognized objection exists. These rules also leave in place an “accommodation” process as an optional process for certain exempt entities that wish to use it voluntarily. These rules do not alter multiple other federal programs that provide free or subsidized contra-

ceptives for women at risk of unintended pregnancy.

**DATES:** *Effective date:* These regulations are effective on January 14, 2019.

**FOR FURTHER INFORMATION CONTACT:** Jeff Wu, at (301) 492-4305 or [marketreform@cms.hhs.gov](mailto:marketreform@cms.hhs.gov) for the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS); Amber Rivers or Matthew Litton, Employee Benefits Security Administration (EBSA), Department of Labor, at (202) 693-8335; William Fischer, Internal Revenue Service, Department of the Treasury, at (202) 317-5500 (not toll-free numbers).

*Customer Service Information:* Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline, 1-866-444-EBSA (3272) or visit the Department of Labor’s website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)). Information from HHS on private health insurance coverage can be found on CMS’s website ([www.cms.gov/ccio](http://www.cms.gov/ccio)), and information on health care reform can be found at [www.HealthCare.gov](http://www.HealthCare.gov).

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      - iv. Estimates based on litigating entities that may use expanded exemptions
      - v. Estimates of accommodated entities that may use expanded exemptions
      - vi. Combined estimates of litigating and accommodated entities
      - vii. Alternate estimates based on consideration of pre-ACA plans
      - viii. Final estimates of persons affected by expanded exemptions
- B. Special Analyses—Department of the Treasury
- C. Regulatory Flexibility Act
- D. Paperwork Reduction Act—Department of Health and Human Services
  1. Wage Data
  2. ICRs Regarding Self-Certification or Notices to HHS (§ 147.131(c)(3))
  3. ICRs Regarding Notice of Availability of Separate Payments for Contraceptive Services (§ 147.131(e))
  4. ICRs Regarding Notice of Revocation of Accommodation (§ 147.131(c)(4))
  5. Submission of PRA-Related Comments
- E. Paperwork Reduction Act—Department of Labor
- F. Regulatory Reform Executive Orders 13765, 13771 and 13777
- G. Unfunded Mandates Reform Act
- H. Federalism
- V. Statutory Authority

## I. Executive Summary and Background

### A. Executive Summary

#### 1. Purpose

The primary purpose of this rule is to finalize, with changes in response to public comments, the interim final regulations with requests for comments (IFCs) published in the **Federal Register** on October 13, 2017 (82 FR 47792), “Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act” (the Religious IFC). The rules are necessary to expand the protections for the sincerely held religious objections of certain entities and individuals. The rules, thus, minimize the burdens imposed on their exercise of religious beliefs, with regard to the discretionary requirement that health plans cover certain contraceptive services with no cost-sharing, a requirement that was created by HHS through guidance promulgated by the Health Resources and Services Administration (HRSA) (hereinafter “Guidelines”), pursuant to authority granted by the ACA in section 2713(a)(4) of the Public Health Service Act. In addition, the rules maintain a previously created accommodation process that permits entities with certain religious objections voluntarily to continue to object while the persons covered in their plans receive contraceptive coverage or payments arranged by their health insurance issuers or third party administrators. The rules do not remove the contraceptive coverage requirement generally from HRSA’s Guidelines. The changes being finalized to these rules will ensure that proper respect is afforded to sincerely held religious objections in rules governing this area of health insurance and coverage, with minimal impact on HRSA’s decision to otherwise require contraceptive coverage.

#### 2. Summary of the Major Provisions

- a. Expanded religious exemptions to the contraceptive coverage requirement

These rules finalize exemptions provided in the Religious IFC for the group health plans and health insurance coverage of various entities and individuals



with sincerely held religious beliefs opposed to coverage of some or all contraceptive or sterilization methods encompassed by HRSA's Guidelines. The rules finalize exemptions to the same types of organizations and individuals for which exemptions were provided in the Religious IFC: non-governmental plan sponsors including a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order; a nonprofit organization; for-profit entities; an institution of higher education in arranging student health insurance coverage; and, in certain circumstances, issuers and individuals. The rules also finalize the regulatory restatement in the Religious IFC of language from section 2713(a) and (a)(4) of the Public Health Service Act.

In response to public comments, various changes are made to clarify the intended scope of the language in the Religious IFC. The prefatory language to the exemptions is clarified to ensure exemptions apply to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections. The Departments add language to clarify that, where an exemption encompasses a plan or coverage established or maintained by a church, an integrated auxiliary of a church, a convention or association of churches, a religious order, a nonprofit organization, or other non-governmental organization or association, the exemption applies to each employer, organization, or plan sponsor that adopts the plan. Language is also added to clarify that the exemptions apply to non-governmental entities, including as the exemptions apply to institutions of higher education. The Departments revise the exemption applicable to health insurance issuers to make clear that the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement. The Departments also restructure the provision describing the religious objection for en-

ties. That provision specifies that the entity objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for either: coverage or payments for some or all contraceptive services; or, a plan, issuer, or third party administrator that provides or arranges such coverage or payments.

The Departments also clarify language in the exemption applicable to plans of objecting individuals. The final rule specifies that the individual exemption ensures that the HRSA Guidelines do not prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. The exemption adds that, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

#### b. Optional accommodation.

These rules also finalize provisions from the Religious IFC that maintain the accommodation process as an optional process for entities that qualify for the exemption. Under that process, entities can choose to use the accommodation process so that contraceptive coverage to which they object is omitted from their plan, but their issuer or third party administrator, as applicable, will arrange for the persons covered by their plan to receive contraceptive coverage or payments.

In response to public comments, these final rules make technical changes to the

accommodation regulations maintained in parallel by HHS, the Department of Labor, and the Department of the Treasury. The Departments modify the regulations governing when an entity, that was using or will use the accommodation, can revoke the accommodation and operate under the exemption. The modifications set forth a transitional rule as to when entities currently using the accommodation may revoke it and use the exemption by giving 60-days notice pursuant to Public Health Service Act section 2715(d)(4) and 45 CFR 147.200(b), 26 CFR 54.9815-2715(b), and 29 CFR 2590.715-2715(b). The modifications also express a general rule that, in plan years that begin after the date on which these final rules go into effect, if contraceptive coverage is being offered by an issuer or third party administrator through the accommodation process, an organization eligible for the accommodation may revoke its use of the accommodation process effective no sooner than the first day of the first plan year that begins on or after 30 days after the date of the revocation.

The Departments also modify the Religious IFC by adding a provision that existed in rules prior to the Religious IFC, namely, that if an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation, and the representation is later determined to be incorrect, the issuer is considered to comply with any applicable contraceptive coverage requirement from HRSA's Guidelines if the issuer complies with the obligations under this section applicable to such issuer. Likewise, the rule adds pre-existing "reliance" language deeming an issuer serving an accommodated organization compliant with the contraceptive coverage requirement if the issuer relies reasonably and in good faith on a representation by an organization as to its eligibility for the accommodation and the issuer otherwise complies with the accommodation regulation, and likewise deeming a group health plan compliant with the contraceptive coverage requirement if it complies with the accommodation regulation.

### 3. Summary of Costs, Savings and Benefits of the Major Provisions

Provision	Savings and Benefits	Costs
Restatement of statutory language from section 2713(a) and (a)(4) of the Public Health Service Act	The purpose of this provision is to ensure that the regulatory language that restates section 2713(a) and (a)(4) of the Public Health Service Act mirrors the language of the statute. We estimate no economic savings or benefit from finalizing this part of the rule, but consider it a deregulatory action to minimize the regulatory impact beyond the scope set forth in the statute.	We estimate no costs from finalizing this part of the rule.
Expanded religious exemptions	Expanding religious exemptions to the contraceptive coverage requirement will relieve burdens that some entities and individuals experience from being forced to choose between, on the one hand, complying with their religious beliefs and facing penalties from failing to comply with the contraceptive coverage requirement, and on the other hand, providing (or, for individuals, obtaining) contraceptive coverage or using the accommodation in violation of their sincerely held religious beliefs.	We estimate there will be transfer costs where women previously receiving contraceptive coverage from employers will no longer receive that coverage where the employers use the expanded exemptions. Even after the public comment period, we have very limited data on what the scale of those transfer costs will be. We estimate that in no event will they be more than \$68.9 million.  We estimate that, where entities using the accommodation revoke it to use the exemption, the cost to industry of sending notices of revocation to their policy holders will be \$112,163.
Optional accommodation regulations	Maintaining the accommodation as an optional process will ensure that contraceptive coverage is made available to many women covered by plans of employers that object to contraceptive coverage but not to their issuers or third party administrators arranging for such coverage to be provided to their plan participants.	We estimate that, by expanding the types of organizations that may use the accommodation, some entities not currently using it will opt into it. When doing so they will incur costs of \$677 to send a self-certification or notice to their issuer or third party administrator, or to HHS, to commence operation of the accommodation.  We estimate that entities that newly make use of the accommodation as the result of these rules, or their issuers or third party administrators, will incur costs of \$311,304 in providing their policy holders with notices indicating that contraceptive coverage or payments are available to them under the accommodation process.

## B. Background

Over many decades, Congress has protected conscientious objections, including

those based on religious beliefs, in the context of health care and human services including health coverage, even as it has sought to promote and expand access to health services.<sup>1</sup> In 2010, Congress enacted the Patient Protection and Afford-

<sup>1</sup>See, for example, 42 U.S.C. 300a-7 (protecting individuals and health care entities from being required to provide or assist sterilizations, abortions, or other lawful health services if it would violate their “religious beliefs or moral convictions”); 42 U.S.C. 238n (protecting individuals and entities that object to abortion); Consolidated Appropriations Act of 2018, Div. H, Sec. 507(d) (Departments of Labor, HHS, and Education, and Related Agencies Appropriations Act), Pub. L. No. 115-141, 132 Stat. 348, 764 (Mar. 23, 2018) (protecting any “health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan” in objecting to abortion for any reason); *id.* at Div. E, Sec. 726(c) (Financial Services and General Government Appropriations Act) (protecting individuals who object to prescribing or providing contraceptives contrary to their “religious beliefs or moral convictions”); *id.* at Div. E, Sec. 808 (regarding any requirement for “the provision of contraceptive coverage by health insurance plans” in the District of Columbia, “it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions.”); *id.* at Div. I, (Department of State, Foreign Operations, and Related Programs Appropriations Act) (protecting applicants for family planning funds based on their “religious or conscientious commitment to offer only natural family planning”); 42 U.S.C. 290bb-36 (prohibiting the statutory section from being construed to require suicide-related treatment services for youth where the parents or legal guardians object based on “religious beliefs or moral objections”); 42 U.S.C. 290kk-1 (protecting the religious character of organizations participating in certain programs and the religious freedom of beneficiaries of the programs); 42 U.S.C. 300x-65 (protecting the religious character of organizations and the religious freedom of individuals involved in the use of government funds to provide substance abuse services); 42 U.S.C. 604a (protecting the religious character of organizations and the religious freedom of beneficiaries involved in the use of government assistance to needy families); 42 U.S.C. 1395w-22(j)(3)(B) (protecting against forced counseling or referrals in Medicare+Choice (now Medicare Advantage) managed care plans with respect to objections based on “moral or religious grounds”); 42 U.S.C. 1396a(w)(3) (ensuring particular Federal

able Care Act (PPACA) (Pub. L. 111–148) (March 23, 2010). Congress enacted the Health Care and Education Reconciliation Act of 2010 (HCERA) (Pub. L. 111–152) on March 30, 2010, which, among other things, amended the PPACA. As amended by HCERA, the PPACA is known as the Affordable Care Act (ACA).

The ACA reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The ACA adds section 715(a)(1) to the Employee Retirement Income Security Act of 1974 (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code), in order to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The sections of the PHS Act incorporated into ERISA and the Code are sections 2701 through 2728.

In section 2713(a)(4) of the PHS Act (hereinafter “section 2713(a)(4)”), Congress provided administrative discretion to require that certain group health plans and health insurance issuers cover certain women’s preventive services, in addition to other preventive services required to be covered in section 2713. Congress granted that discretion to the Health Resources and Services Administration (HRSA), a component of the U.S. Department of

Health and Human Services (HHS). Specifically, section 2713(a)(4) allows HRSA discretion to specify coverage requirements, “with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by” HRSA’s Guidelines.

Since 2011, HRSA has exercised that discretion to require coverage for, among other things, certain contraceptive services.<sup>2</sup> In the same time period, the Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, “the Departments”<sup>3</sup>) have promulgated regulations to guide HRSA in exercising its discretion to allow exemptions to those requirements, including issuing and finalizing three interim final regulations prior to 2017.<sup>4</sup> In those regulations, the Departments defined the scope of permissible exemptions and accommodations for certain religious objectors where the Guidelines require coverage of contraceptive services, changed the scope of those exemptions and accommodations, and solicited public comments on a number of occasions. Many individuals and entities brought legal challenges to the contraceptive coverage requirement and regulations (hereinafter, the “contraceptive Mandate,” or the “Mandate”) as being inconsistent with various legal protections, including the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1 (“RFRA”). Several of those cases went to the Supreme Court. *See, for example, Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The Departments most recently solicited public comments on these issues again in two interim final regulations with requests for comments (IFCs) published in the **Federal Register** on October 13, 2017: the regulations (82 FR 47792) that are being finalized with changes here, and regulations (82 FR 47838) concerning moral objections (the Moral IFC), which are being finalized with changes in companion final rules published elsewhere in today’s **Federal Register**.

In the preamble to the Religious IFC, the Departments explained several reasons why it was appropriate to reevaluate the religious exemptions and accommodations for the contraceptive Mandate and to take into account the religious beliefs of certain employers concerning that Mandate. The Departments also sought public comment on those modifications. The Departments considered, among other things, Congress’s history of providing protections for religious beliefs regarding certain health services (including contraception, sterilization, and items or services believed to involve abortion); the text, context, and intent of section 2713(a)(4) and the ACA; protection of the free exercise of religion in the First Amendment and, by Congress, in RFRA; Executive Order 13798, “Promoting Free Speech and Religious Liberty” (May 4, 2017); previously submitted public comments; and the extensive litigation over the contraceptive Mandate.

After consideration of the comments and feedback received from stakeholders, the Departments are finalizing the Reli-

law does not infringe on “conscience” as protected in state law concerning advance directives); 42 U.S.C. 1396u-2(b)(3) (protecting against forced counseling or referrals in Medicaid managed care plans with respect to objections based on “moral or religious grounds”); 42 U.S.C. 5106i (prohibiting certain Federal statutes from being construed to require that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian); 42 U.S.C. 2996f(b) (protecting objection to abortion funding in legal services assistance grants based on “religious beliefs or moral convictions”); 42 U.S.C. 14406 (protecting organizations and health providers from being required to inform or counsel persons pertaining to assisted suicide); 42 U.S.C. 18023 (blocking any requirement that issuers or exchanges must cover abortion); 42 U.S.C. 18113 (protecting health plans or health providers from being required to provide an item or service that helps cause assisted suicide); see also 8 U.S.C. 1182(g) (protecting vaccination objections by “aliens” due to “religious beliefs or moral convictions”); 18 U.S.C. 3597 (protecting objectors to participation in Federal executions based on “moral or religious convictions”); 20 U.S.C. 1688 (prohibiting sex discrimination law to be used to require assistance in abortion for any reason); 22 U.S.C. 7631(d) (protecting entities from being required to use HIV/AIDS funds contrary to their “religious or moral objection”).

<sup>2</sup>The references in this document to “contraception,” “contraceptive,” “contraceptive coverage,” or “contraceptive services” generally include all contraceptives, sterilization, and related patient education and counseling, required by the Women’s Preventive Guidelines, unless otherwise indicated. The Guidelines issued in 2011 referred to “Contraceptive Methods and Counseling” as “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” <https://www.hrsa.gov/womens-guidelines/index.html>. The Guidelines as amended in December 2016 refer, under the header “Contraception,” to: “the full range of female-controlled U.S. Food and Drug Administration-approved contraceptive methods, effective family planning practices, and sterilization procedures,” “contraceptive counseling, initiation of contraceptive use, and follow-up care (for example, management, and evaluation as well as changes to and removal or discontinuation of the contraceptive method),” and “instruction in fertility awareness-based methods, including the lactation amenorrhea method.” <https://www.hrsa.gov/womens-guidelines-2016/index.html>.

<sup>3</sup>Note, however, that in sections under headings listing only two of the three Departments, the term “Departments” generally refers only to the two Departments listed in the heading.

<sup>4</sup>Interim final regulations on July 19, 2010, at 75 FR 41726 (July 2010 interim final regulations); interim final regulations amending the July 2010 interim final regulations on August 3, 2011, at 76 FR 46621; final regulations on February 15, 2012, at 77 FR 8725 (2012 final regulations); an advance notice of proposed rulemaking (ANPRM) on March 21, 2012, at 77 FR 16501; proposed regulations on February 6, 2013, at 78 FR 8456; final regulations on July 2, 2013, at 78 FR 39870 (July 2013 final regulations); interim final regulations on August 27, 2014, at 79 FR 51092 (August 2014 interim final regulations); proposed regulations on August 27, 2014, at 79 FR 51118 (August 2014 proposed regulations); final regulations on July 14, 2015, at 80 FR 41318 (July 2015 final regulations); and a request for information on July 26, 2016, at 81 FR 47741 (RFI), which was addressed in an FAQ document issued on January 9, 2017, available at: <https://www.doi.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36\\_1-9-17-Final.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36_1-9-17-Final.pdf).



gious IFC, with changes based on comments as indicated herein.<sup>5</sup>

## II. Overview, Analysis, and Response to Public Comments

We provided a 60-day public comment period for the Religious IFC, which closed on December 5, 2017. The Departments received over 56,000 public comment submissions, which are posted at [www.regulations.gov](http://www.regulations.gov).<sup>6</sup> Below, the Departments provide an overview of the general comments on the final regulations, and address the issues raised by commenters.

These rules expand exemptions to protect religious beliefs for certain entities and individuals with religious objections to contraception whose health plans are subject to a mandate of contraceptive coverage through guidance issued pursuant to the ACA. These rules do not alter the discretion of HRSA, a component of HHS, to maintain the Guidelines requiring contraceptive coverage where no regulatorily recognized objection exists. These rules finalize the accommodation process, which was previously established in response to objections of religious organizations that were not protected by the original exemption, as an optional process for any exempt entities. These rules do not alter multiple other federal programs that provide free or subsidized contraceptives or related education and counseling for women at risk of unintended pregnancy.<sup>7</sup>

### A. The Departments' Authority to Mandate Coverage and Provide Religious Exemptions

The Departments received conflicting comments on their legal authority to provide the expanded exemptions and accommodation for religious beliefs. Some com-

menters agreed that the Departments are legally authorized to provide the expanded exemptions and accommodation, noting that there was no requirement of contraceptive coverage in the ACA and no prohibition on providing religious exemptions in Guidelines issued under section 2713(a)(4). Other commenters, however, asserted that the Departments have no legal authority to provide any exemptions to the contraceptive Mandate, contending, based on statements in the ACA's legislative history, that the ACA requires contraceptive coverage. Still other commenters contended that the Departments are legally authorized to provide the exemptions that existed prior to the Religious IFC, but not to expand them.

Some commenters who argued that section 2713(a)(4) does not allow for exemptions said that the previous exemptions for houses of worship and integrated auxiliaries, and the previous accommodation process, were set forth in the ACA itself, and therefore were acceptable while the expanded exemptions in the Religious IFC were not. This is incorrect. The ACA does not prescribe (or prohibit) the previous exemptions for house of worship and the accommodation processes that the Departments issued through regulations.<sup>8</sup> The Departments, therefore, find it appropriate to use the regulatory process to issue these expanded exemptions and accommodation, to better address concerns about religious exercise.

The Departments conclude that legal authority exists to provide the expanded exemptions and accommodation for religious beliefs set forth in these final rules. These rules concern section 2713 of the PHS Act, as also incorporated into ERISA and the Code. Congress has granted the Departments legal authority, collectively, to administer these statutes.<sup>9</sup>

Where it applies, section 2713(a)(4) requires coverage without cost sharing for "such additional" women's preventive care and screenings "as provided for" and "supported by" Guidelines developed by HHS through HRSA. When Congress enacted this provision, those Guidelines did not exist. And nothing in the statute mandated that the Guidelines had to include contraception, let alone for all types of employers with covered plans. Instead, section 2713(a)(4) provided a positive grant of authority for HRSA to develop those Guidelines, thus delegating authority to HHS, as the administering agency of HRSA, and to all three agencies, as the administering agencies of the statutes by which the Guidelines are enforced, to shape that development. *See* 26 U.S.C. 9834; 29 U.S.C. 1191(c), 42 U.S.C. 300gg-92. That is especially true for HHS, as HRSA is a component of HHS that was unilaterally created by the agency and thus is subject to the agency's general supervision, *see* 47 FR 38,409 (August 31, 1982). Thus, nothing prevented HRSA from creating an exemption from otherwise-applicable Guidelines or prevented HHS and the other agencies from directing that HRSA create such an exemption.

Congress did not specify the extent to which HRSA must "provide for" and "support" the application of Guidelines that it chooses to adopt. HRSA's authority to support "comprehensive guidelines" involves determining both the types of coverage and scope of that coverage. Section 2714(a)(4) requires coverage for preventive services only "as provided for in comprehensive guidelines supported by [HRSA]." That is, services are required to be included in coverage only to the extent that the Guidelines supported by HRSA provide for them. Through use of the word "as" in the phrase "as provided for," it requires that HRSA

<sup>5</sup>The Department of the Treasury and the Internal Revenue Service (IRS) published proposed and temporary regulations as part of the joint rulemaking of the Religious IFC. The Departments of Labor and HHS published their respective rules as interim final rules with request for comments and are finalizing their interim final rules. The Department of the Treasury and IRS are finalizing their proposed regulations.

<sup>6</sup>*See* [Regulations.gov](https://www.regulations.gov/searchResults?rpp=25&so=DESC&sb=postedDate&po=0&cmd=12%7C05%7C17-12%7C05%7C17&dktid=CMS-2014-0115) at <https://www.regulations.gov/searchResults?rpp=25&so=DESC&sb=postedDate&po=0&cmd=12%7C05%7C17-12%7C05%7C17&dktid=CMS-2014-0115> and <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=7525&dct=PS&D=IRS-2017-0016>. Some of those submissions included form letters or attachments that, while not separately tabulated at [www.regulations.gov](http://www.regulations.gov), together included comments from, or were signed by, hundreds of thousands of separate persons. The Departments reviewed all of the public comments and attachments.

<sup>7</sup>*See, for example*, Family Planning grants in 42 U.S.C. 300 *et seq.*; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. 711; Maternal and Child Health Block Grants, 42 U.S.C. 703; 42 U.S.C. 247b-12; Title XIX of the Social Security Act, 42 U.S.C. 1396, *et seq.*; the Indian Health Service, 25 U.S.C. 13, 42 U.S.C. 2001(a), and 25 U.S.C. 1601, *et seq.*; Health center grants, 42 U.S.C. 254b(e), (g), (h), and (i); the NIH Clinical Center, 42 U.S.C. 248; and the Personal Responsibility Education Program, 42 U.S.C. 713.

<sup>8</sup>The ACA also does not require that contraceptives be covered under the preventive services provisions.

<sup>9</sup>26 U.S.C. 9833; 29 U.S.C. 1191c; 42 U.S.C. 300gg-92.

support how those services apply—that is, the manner in which the support will happen, such as in the phrase “as you like it.”<sup>10</sup> When Congress means to require certain activities to occur in a certain manner, instead of simply authorizing the agency to decide the manner in which they will occur, Congress knows how to do so. *See, e.g.*, 42 U.S.C. 1395x (“The Secretary shall establish procedures to make beneficiaries and providers aware of the requirement that a beneficiary complete a health risk assessment *prior to or at the same time as* receiving personalized prevention plan services.”) (emphasis added). Thus, the inclusion of “as” in section 300gg-13(a)(3), and its absence in similar neighboring provisions, shows that HRSA has been granted discretion in supporting how the preventive coverage mandate applies—it does not refer to the timing of the promulgation of the Guidelines.

Nor is it simply a textual aberration that the word “as” is missing from the other three provisions in PHS Act section 2713(a). Rather, this difference mirrors other distinctions within that section that demonstrate that Congress intended HRSA to have the discretion the Agencies invoke. For example, sections (a)(1) and (a)(3) require “evidence-based” or “evidence-informed” coverage, while section (a)(4) does not. This difference suggests that the Agencies have the leeway to incorporate policy-based concerns into their decision-making. This reading of section 2713(a)(4) also prevents the statute from being interpreted in a cramped way that allows no flexibility or tailoring, and that would force the Departments to choose between ignoring religious objections in violation of RFRA or else eliminating the contraceptive coverage requirement from the Guidelines altogether. The Departments instead interpret section 2713(a)(4) as authorizing HRSA’s Guidelines to set forth both the kinds of items and services that will be covered, and the scope of entities to which the contraceptive coverage requirement in those Guidelines will apply.

The religious objections at issue here, and in regulations providing exemptions from the inception of the Mandate in 2011, are considerations that, consistent with the statutory provision, permissibly

inform what HHS, through HRSA, decides to provide for and support in the Guidelines. Since the first rulemaking on this subject in 2011, the Departments have consistently interpreted the broad discretion granted to HRSA in section 2713(a)(4) as including the power to reconcile the ACA’s preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive Mandate. (*See* 76 FR at 46623.) As the Departments explained at that time, the HRSA Guidelines “exist solely to bind non-grandfathered group health plans and health insurance issuers with respect to the extent of their coverage of certain preventive services for women,” and “it is appropriate that HRSA . . . takes into account the effect on the religious beliefs of [employers] if coverage of contraceptive services were required in [their] group health plans.” *Id.* Consistent with that longstanding view, Congress’s grant of discretion in section 2713(a)(4), and the lack of a specific statutory mandate that contraceptives must be covered or that they be covered without any exemptions or exceptions, supports the conclusion that the Departments are legally authorized to exempt certain entities or plans from a contraceptive Mandate if HRSA decides to otherwise include contraceptives in its Guidelines.

The conclusions on which these final rules are based are consistent with the Departments’ interpretation of section 2713 of the PHS Act since 2010, when the ACA was enacted, and since the Departments started to issue interim final regulations implementing that section. The Departments have consistently interpreted section 2713(a)(4)’s grant of authority to include broad discretion regarding the extent to which HRSA will provide for, and support, the coverage of additional women’s preventive care and screenings, including the decision to exempt certain entities and plans, and not to provide for or support the application of the Guidelines with respect to those entities or plans. The Departments defined the scope of the exemption to the contraceptive Mandate when HRSA issued its Guidelines for contraceptive coverage in 2011, and then

amended and expanded the exemption and added an accommodation process in multiple rulemakings thereafter. The accommodation process requires the provision of coverage or payments for contraceptives to participants in an eligible organization’s health plan by the organization’s insurer or third party administrator. However, the accommodation process itself, in some cases, failed to require contraceptive coverage for many women, because—as the Departments acknowledged at the time—the enforcement mechanism for that process, section 3(16) of ERISA, does not provide a means to impose an obligation to provide contraceptive coverage on the third party administrators of self-insured church plans. *See* 80 FR 41323. Non-exempt employers participate in many church plans. Therefore, in both the previous exemption, and in the previous accommodation’s application to self-insured church plans, the Departments have been choosing not to require contraceptive coverage for certain kinds of employers since the Guidelines were adopted. During prior rulemakings, the Departments also disagreed with commenters who contended the Departments had no authority to create exemptions under section 2713 of the PHS Act, or as incorporated into ERISA and the Code, and who contended instead that we must enforce the Guidelines on the broadest spectrum of group health plans as possible. *See, e.g.*, 2012 final regulations at 77 FR 8726.

The Departments’ interpretation of section 2713(a)(4) is confirmed by the ACA’s statutory structure. Congress did not intend to require coverage of preventive services for every type of plan that is subject to the ACA. *See, e.g.*, 76 FR 46623. On the contrary, Congress carved out an exemption from PHS Act section 2713 (and from several other provisions) for grandfathered plans. In contrast, grandfathered plans do have to comply with many of the other provisions in Title I of the ACA—provisions referred to by the previous Administration as providing “particularly significant protections.” (75 FR 34540). Those provisions include (from the PHS Act) section 2704, which prohibits preexisting condition exclusions or other discrimination based on health status in

<sup>10</sup>See *As* (usage 2), *Oxford English Dictionary Online* (Feb. 2018) (“[u]sed to indicate by comparison the way something happens or is done”).



group health coverage; section 2708, which prohibits excessive waiting periods (as of January 1, 2014); section 2711, which relates to lifetime and annual dollar limits; section 2712, which generally prohibits rescission of health coverage; section 2714, which extends dependent child coverage until the child turns 26; and section 2718, which imposes a minimum medical loss ratio on health insurance issuers in the individual and group health insurance markets, and requires them to provide rebates to policyholders if that medical loss ratio is not met. (75 FR 34538, 34540, 34542). Consequently, of the 150 million nonelderly people in America with employer-sponsored health coverage, approximately 25.5 million are estimated to be enrolled in grandfathered plans not subject to section 2713.<sup>11</sup> Some commenters assert the exemptions for grandfathered plans are temporary, or were intended to be temporary, but as the Supreme Court observed, “there is no legal requirement that grandfathered plans ever be phased out.” *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Some commenters argue that Executive Order 13535’s reference to implementing the ACA consistent with certain conscience laws does not justify creating exemptions to contraceptive coverage in the Guidelines, because those laws do not specifically require exemptions to the Mandate in the Guidelines. The Departments, however, believe these final regulations are consistent with Executive Order 13535. Issued upon the signing of the ACA, Executive Order 13535 specified that “longstanding Federal laws to protect conscience . . . remain intact,” including laws that protect holders of religious beliefs from certain requirements in health care contexts. While the Executive Order 13535 does not require the expanded exemptions in these rules, the expanded exemptions are, as explained below, consistent with longstanding federal laws that protect religious beliefs, and are consistent with the Executive Order’s intent that the ACA would be implemented in accordance with the conscience protections set forth in those laws.

The extent to which RFRA provides authority for these final rules is discussed below in section II.C., The First Amendment and the Religious Freedom Restoration Act.

### *B. Availability and Scope of Religious Exemptions*

Some commenters supported the expanded exemptions and accommodation in the Religious IFC, and the entities and individuals to which they applied. They asserted the expanded exemptions and accommodation are appropriate exercises of discretion and are consistent with religious exemptions Congress has provided in many similar contexts. Some further commented that the expanded exemptions are necessary under the First Amendment or RFRA. Similarly, commenters stated that the accommodation was an inadequate means to resolve religious objections, and that the expanded exemptions are needed. They objected to the accommodation process because it was another method to require compliance with the Mandate. They contended its self-certification or notice involved triggering the very contraceptive coverage that organizations objected to, and that such coverage flowed in connection with the objecting organizations’ health plans. The commenters contended that the seamlessness cited by the Departments between contraceptive coverage and an accommodated plan gives rise to the religious objections that organizations would not have with an expanded exemption.

Several other commenters asserted that the exemptions in the Religious IFC are too narrow and called for there to be no mandate of contraceptive coverage. Some of them contended that HRSA should not include contraceptives in their women’s preventive services Guidelines because fertility and pregnancy are generally healthy conditions, not diseases that are appropriately the target of preventive health services. They also contended that contraceptives can pose medical risks for women and that studies do not show that contraceptive programs reduce abortion rates or rates of unintended pregnancies. Some commenters contended that, to the extent the Guidelines require

coverage of certain drugs and devices that may prevent implantation of an embryo after fertilization, they require coverage of items that are abortifacients and, therefore, violate federal conscience protections such as the Weldon Amendment, *see* section 507(d) of Public Law 115–141.

Other commenters contended that the expanded exemptions are too broad. In general, these commenters supported the inclusion of contraceptives in the Guidelines, contending they are a necessary preventive service for women. Some said that the Departments should not exempt various kinds of entities such as businesses, health insurance issuers, or other plan sponsors that are not nonprofit entities. Other commenters contended the exemptions and accommodation should not be expanded, but should remain the same as they were in the July 2015 final regulations (80 FR 41318). Some commenters said the Departments should not expand the exemptions, but simply expand or adjust the accommodation process to resolve religious objections to the Mandate and accommodation. Some commenters contended that even the previous regulations allowing an exemption and accommodation were too broad, and said that no exemptions to the Mandate should exist, in order that contraceptive coverage would be provided to as many women as possible.

After consideration of the comments, the Departments are finalizing the provisions of the Religious IFC without contracting the scope of the exemptions and accommodation set forth in the Religious IFC. Since HRSA issued its Guidelines in 2011, the Departments have recognized that religious exemptions from the contraceptive Mandate are appropriate. The details of the scope of such exemptions are discussed in further detail below. In general, the Departments conclude it is appropriate to maintain the exemptions created by the Religious IFC to avoid instances where the Mandate is applied in a way that violates the religious beliefs of certain plan sponsors, issuers, or individuals. The Departments do not believe the previous exemptions are adequate, because some religious objections by plan sponsors and

<sup>11</sup>Kaiser Family Foundation & Health Research & Educational Trust, “Employer Health Benefits, 2017 Annual Survey,” Henry J Kaiser Family Foundation (Sept. 2017), <http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017>.

individuals were favored with exemptions, some were not subjected to contraceptive coverage if they fell under the indirect exemption for certain self-insured church plans, and others had to choose between the Mandate and the accommodation even though they objected to both. The Departments wish to avoid inconsistency in respecting religious objections in connection with the provision of contraceptive coverage. The lack of a congressional mandate that contraceptives be covered, much less that they be covered without religious exemptions, has also informed the Departments' decision to expand the exemptions. And Congress's decision not to apply PHS Act section 2713 to grandfathered plans has likewise informed the Departments' decision whether exemptions to the contraceptive Mandate are appropriate.

Congress has also established a background rule against substantially burdening sincere religious beliefs except where consistent with the stringent requirements of the Religious Freedom Restoration Act. And Congress has consistently provided additional, specific exemptions for religious beliefs in statutes addressing federal requirements in the context of health care and specifically concerning issues such as abortion, sterilization, and contraception. Therefore, the Departments consider it appropriate, to the extent we impose a contraceptive coverage Mandate by the exercise of agency discretion, that we also include exemptions for the protection of religious beliefs in certain cases. The expanded exemptions finalized in these rules are generally consistent with the scope of exemptions that Congress has established in similar contexts. They are also consistent with the intent of Executive Order 13535 (March 24, 2010), which was issued upon the signing of the ACA and declared that, "[u]nder the Act, longstanding federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact" and that "[n]umerous executive agencies have a role in ensuring that these restrictions are enforced, including the HHS."

Some commenters argued that Congress's failure to explicitly include religious exemptions in PHS Act section 2713 itself is indicative of an intent that such exemptions not be included, but the Departments disagree. As noted above, Congress also failed to require contraceptive coverage in PHS Act section 2713. And the commenters' argument would negate not just these expanded exemptions, but the previous exemptions for houses of worship and integrated auxiliaries, and the indirect exemption for self-insured church plans that use the accommodation. Where Congress left so many matters concerning section 2713(a)(4) to agency discretion, the Departments consider it appropriate to implement these expanded exemptions in light of Congress's long history of respecting religious beliefs in the context of certain federal health care requirements.

If there is to be a federal contraceptive mandate that fails to include some—or, in the views of some commenters, any—religious exemptions, the Departments do not believe it is appropriate for us to impose such a regime through discretionary administrative measures. Instead, such a serious imposition on religious liberty should be created, if at all, by Congress, in response to citizens exercising their rights of political participation. Congress did not prohibit religious exemptions under this Mandate. It did not even require contraceptive coverage under the ACA. It left the ACA subject to RFRA, and it specified that additional women's preventive services will only be required coverage as provided for in Guidelines supported by HRSA. Moreover, Congress legislated in the context of the political consensus on conscientious exemptions for health care that has long been in place. Since *Roe v. Wade* in 1973, Congress and the states have consistently offered religious exemptions for health care providers and others concerning issues such as sterilization and abortion, which implicate deep disagreements on scientific, ethical, and religious (and moral) concerns. Indeed over the last 44 years, Congress has repeatedly expanded religious exemptions in similar cases, including to contrac-

ceptive coverage. Congress did not purport to deviate from that approach in the ACA. Thus, we conclude it is appropriate to specify in these final rules, that, if the Guidelines continue to maintain a contraceptive coverage requirement, the expanded exemptions will apply to those Guidelines and their enforcement.

Some commenters contended that, even though Executive Order 13535 refers to the Church Amendments, the intention of those statutes is narrow, should not be construed to extend to entities, and should not be construed to prohibit procedures. But those comments mistake the Departments' position. The Departments are not construing the Church Amendments to require these exemptions, nor do the exemptions prohibit any procedures. Instead, through longstanding federal conscience statutes, Congress has established consistent principles concerning respect for religious beliefs in the context of certain Federal health care requirements. Under those principles, and absent any contrary requirement of law, the Departments are offering exemptions for sincerely held religious beliefs to the extent the Guidelines otherwise include contraceptive coverage.<sup>12</sup> These exemptions do not prohibit any services, nor do they authorize employers to prohibit employees from obtaining any services. The Religious IFC and these final rules simply refrain from imposing the federal Mandate that employers and health insurance issuers cover contraceptives in their health plans where compliance with the Mandate would violate their sincerely held religious beliefs. And though not necessary to the Departments' decision here, the Departments note that the Church Amendments explicitly protect entities and that several subsequent federal conscience statutes have protected against federal mandates in health coverage.

The Departments note that their decision is also consistent with state practice. A significant majority of states either impose no contraceptive coverage requirement or offer broader exemptions than the exemption contained in the July 2015 final

<sup>12</sup>The Departments note that the Church Amendments are the subject of another, ongoing rulemaking process. See Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 FR 3880 (NPRM Jan. 26, 2018). Since the Departments are not construing the Amendments to require the religious exemptions, we defer issues regarding the scope, interpretation, and protections of the Amendments to HHS in that rulemaking.

regulations.<sup>13</sup> Although the practice of states is not a limit on the discretion delegated to HRSA by the ACA, nor is it a statement about what the federal government may do consistent with RFRA or other limitations or protections embodied in federal law, such state practices can inform the Departments' view that it is appropriate to protect religious liberty as an exercise of agency discretion.

The Departments decline to adopt the suggestion of some commenters to use these final rules to revoke the contraceptive Mandate altogether, such as by declaring that HHS through HRSA shall not include contraceptives in the list of women's preventive services in Guidelines issued under section 2713(a)(4). Although previous regulations were used to authorize religious exemptions and accommodations to the imposition of the Guidelines' coverage of contraception, the issuance of the Guidelines themselves in 2011 describing what items constitute recommended women's preventive services, and the update to those recommendations in December 2016, did not occur through the regulations that preceded the 2017 Religious IFC and these final rules. The Guidelines' specification of which women's preventive services were recommended were issued, not by regulation, but directly by HRSA, after consultation with external organizations that operated under cooperative agreements with HRSA to consider the issue, solicit public comment, and provide recommendations. The Departments decline to accept the invitation of some commenters to use these rules to specify whether HRSA includes contraceptives in the Guidelines at all. Instead the Departments conclude it is appropriate for these rules to continue to focus on restating the statutory language of PHS Act section 2713 in regulatory form, and delineating what exemptions and accommodations apply if HRSA lists contraceptives in its Guidelines. Some commenters said that if contraceptives are not removed from the Guidelines entirely, some entities or individuals with religious objections might not

qualify for the exemptions or accommodation. As discussed below, however, the exemptions in the Religious IFC and these final rules cover a broad range of entities and individuals. The Departments are not aware of specific groups or individuals whose religious beliefs would still be substantially burdened by the Mandate after the issuance of these final rules.

Some commenters asserted that HRSA should remove contraceptives from the Guidelines because the Guidelines have not been subject to the notice and comment process under the Administrative Procedure Act. Some commenters also contended that the Guidelines should be amended to omit items that may prevent (or possibly dislodge) the implantation of a human embryo after fertilization, in order to ensure consistency with conscience provisions that prohibit requiring plans to pay for or cover abortions.

Whether and to what extent the Guidelines continue to list contraceptives, or items considered to prevent implantation of an embryo, for entities not subject to exemptions and an accommodation, and what process is used to include those items in the Guidelines, is outside the scope of these final rules. These rules focus on what religious exemptions and accommodations shall apply if Guidelines issued under section 2713(a)(4) include contraceptives or items considered to be abortifacients.

Members of the public that support or oppose the inclusion of some or all contraceptives in the Guidelines, or wish to comment concerning the content of, and the process for developing and updating, the Guidelines, are welcome to communicate their views to HRSA, at [wellwomancare@hrsa.gov](mailto:wellwomancare@hrsa.gov).

The Departments conclude that it would be inadequate to merely attempt to amend or expand the accommodation process instead of expanding the exemption. In the past, the Departments had stated in our regulations and court briefs that the previous accommodation process required contraceptive coverage or payments in a

way that is "seamless" with the coverage provided by the objecting employer. As a result, in significant respects, that previous accommodation process did not actually accommodate the objections of many entities, as many entities with religious objections have argued. The Departments have attempted to identify an accommodation process that would eliminate the religious objections of all plaintiffs, including seeking public comment through a Request For Information, 81 FR 47741 (July 26, 2016), but we stated in January 2017 that we were unable to develop such an approach at that time.<sup>14</sup> The Departments continue to believe that, because of the nature of the accommodation process, merely amending that accommodation process without expanding the exemptions would not adequately address religious objections to compliance with the Mandate. Instead, we conclude that the most appropriate approach to resolve these concerns is to expand the exemptions as set forth in the Religious IFC and these final rules, while maintaining the accommodation as an option for providing contraceptive coverage, without forcing entities to choose between compliance with either the Mandate or the accommodation and their religious beliefs.

Comments considering the appropriateness of exempting certain specific kinds of entities or individuals are discussed in more detail below.

### *C. The First Amendment and the Religious Freedom Restoration Act*

Some commenters said that the Supreme Court ruled that the exemptions to the contraceptive Mandate, which the Departments previously provided to houses of worship and integrated auxiliaries, were required by the First Amendment. From this, commenters concluded that the exemptions for houses of worship and integrated auxiliaries are legally authorized, but exemptions beyond those are not. But in *Hobby Lobby* and *Zubik*, the Supreme Court did not decide whether the exemp-

<sup>13</sup>See Guttmacher Institute, "Insurance Coverage of Contraceptives", The Guttmacher Institute (June 11, 2018), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

<sup>14</sup>See Departments of Labor, Health and Human Services, and the Treasury, "FAQs About Affordable Care Act Implementation Part 36," (Jan. 9, 2017), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36\\_1-9-17-Final.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36_1-9-17-Final.pdf) ("the comments reviewed by the Departments in response to the RFI indicate that no feasible approach has been identified at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage").



tions previously provided to houses of worship and integrated auxiliaries were required by the First Amendment, and the Court did not say the Departments must apply the contraceptive Mandate to other organizations unless RFRA prohibits the Departments from doing so. Moreover, the previous church exemption, which applied automatically to all churches whether or not they had even asserted a religious objection to contraception, 45 C.F.R. 147.141(a), is not tailored to any plausible free-exercise concerns. The Departments decline to adopt the view that RFRA does not apply to other religious organizations, and there is no logical explanation for how RFRA could require the church exemption but not this expanded religious exemption, given that the accommodation is no less an available alternative for the former than the latter.

Commenters disagreed about the scope of RFRA's protection in this context. Some commenters said that the expanded exemptions and accommodation are consistent with RFRA. Some also said that they are required by RFRA, as the Mandate imposes substantial burdens on religious exercise and fails to satisfy the compelling-interest and least-restrictive-means tests imposed by RFRA. Other commenters, however, contended that the expanded exemptions and accommodation are neither required by, nor consistent with, RFRA. In this vein, some argued that the Departments have a compelling interest to deny religious exemptions, that there is no less restrictive means to achieve its goals, or that the Mandate or its accommodation process do not impose a substantial burden on religious exercise.

For the reasons discussed below, the Departments believe that agencies charged with administering a statute that imposes a substantial burden on the exercise of religion under RFRA have discretion in determining whether the appropriate response is to provide an exemption from the burdensome requirement, or to merely attempt to create an accommodation that would mitigate the burden. Here, after further consideration of these issues and review of the public comments, the Departments have determined that a broader exemption, rather than a mere accommodation, is the appropriate response.

In addition, with respect to religious employers, the Departments conclude that, without finalizing the expanded exemptions, and therefore requiring certain religiously objecting entities to choose between the Mandate, the accommodation, or penalties for noncompliance—or requiring objecting individuals to choose between purchasing insurance with coverage to which they object or going without insurance—the Departments would violate their rights under RFRA.

### 1. Discretion to Provide Religious Exemptions

In the Religious IFC, we explained that even if RFRA does not compel the Departments to provide the religious exemptions set forth in the IFC, the Departments believe the exemptions are the most appropriate administrative response to the religious objections that have been raised.

The Departments received conflicting comments on this issue. Some commenters agreed that the Departments have administrative discretion to address the religious objections even if the Mandate and accommodation did not violate RFRA. Other commenters expressed the view that RFRA does not provide such discretion, but only allows exemptions when RFRA requires exemptions. They contended that RFRA does not require exemptions for entities covered by the expanded exemptions of the Religious IFC, but that subjecting those entities to the accommodation satisfies RFRA, and therefore RFRA provides the Departments with no additional authority to exempt those entities. Those commenters further contended that because, in their view, section 2713(a)(4) does not authorize the expanded exemptions, no statutory authority exists for the Departments to finalize the expanded exemptions.

As discussed above, the Departments disagree with the suggestions of commenters that section 2713(a)(4) does not authorize the Departments to adopt the expanded exemptions. Nevertheless, the Departments note that the expanded exemptions for religious objectors also rest on an additional, independent ground: The Departments have determined that, in light of RFRA, an expanded exemption rather than the existing accommodation is

the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*. Indeed, with respect to at least some objecting entities, an expanded exemption, as opposed to the existing accommodation, is required by RFRA. The Departments disagree with commenters who contend RFRA does not give the Departments discretion to offer these expanded exemptions.

The Departments' determination about their authority under RFRA rests in part on the Departments' reassessment of the interests served by the application of the Mandate in this specific context. Although the Departments previously took the position that the application of the Mandate to objecting employers was narrowly tailored to serve a compelling governmental interest, as discussed below the Departments have now concluded, after reassessing the relevant interests and for the reasons stated below, that it does not. Particularly under those circumstances, the Departments believe that agencies charged with administering a statute that imposes a substantial burden on the exercise of religion under RFRA have discretion in determining whether the appropriate response is to provide an exemption from the burdensome requirement or instead to attempt to create an accommodation that would mitigate the burden. And here, the Departments have determined that a broader exemption rather than the existing accommodation is the appropriate response. That determination is informed by the Departments' reassessment of the relevant interests, as well as by their desire to bring to a close the more than five years of litigation over RFRA challenges to the Mandate.

Although RFRA prohibits the government from substantially burdening a person's religious exercise where doing so is not the least restrictive means of furthering a compelling interest—as is the case with the contraceptive Mandate, pursuant to *Hobby Lobby*—neither RFRA nor the ACA prescribes the remedy by which the government must eliminate that burden, where any means of doing so will require departing from the ACA to some extent (on the view of some commenters, with which the Departments disagree, that section 2713(a)(4) does not itself authorize

the Departments to recognize exceptions). The prior administration *chose* to do so through the complex accommodation it created, but nothing in RFRA or the ACA compelled that novel choice or prohibits the current administration from employing the more straightforward choice of an exemption—much like the existing and unchallenged exemption for churches. After all, on the theory that section 2713(a)(4) allows for no exemptions, the accommodation also departed from section 2713(a)(4) in the sense that employers were not themselves offering contraceptive coverage, and the ACA did not require the Departments to choose that departure rather than the expanded exemptions as the exclusive method to satisfy their obligations under RFRA to eliminate the substantial burden imposed by the Mandate. The agencies' choice to adopt an exemption in addition to the accommodation is particularly reasonable given the existing legal uncertainty as to whether the accommodation itself violates RFRA. *See* 82 Fed. Reg. at 47,798; *see also Ricci v. DeStefano*, 557 U.S. 586, 585 (2009) (holding that an employer need only have a strong basis to believe that an employment practice violates Title VII's disparate impact ban in order to take certain types of remedial action that would otherwise violate Title VII's disparate-treatment ban). Indeed, if the Departments had simply adopted an expanded exemption from the outset—as they did for churches—no one could reasonably have argued that doing so was improper because they should have invented the accommodation instead. Neither RFRA nor the ACA compels a different result now based merely on path dependence.

Although the foregoing analysis is independently sufficient, additional support for this view is provided by the Departments' conclusion, as explained more fully below, that an expanded exemption is required by RFRA for at least some objectors. In the Religious IFC, the Departments reaffirmed their conclusion that there is not a way to satisfy all religious objections by amending the accommodation, (82 FR at 47800), a conclusion that was confirmed by some commenters (and the continued litigation over the accom-

modation).<sup>15</sup> Some commenters agreed the religious objections could not be satisfied by amending the accommodation without expanding the exemptions, because if the accommodation requires an objecting entity's issuer or third party administrator to provide or arrange contraceptive coverage for persons covered by the plan because they are covered by the plan, this implicates the objection of entities to the coverage being provided through their own plan, issuer, or third party administrator. Other commenters contended the accommodation could be modified to satisfy RFRA concerns without extending exemptions to objecting entities, but they did not propose a method of modifying the accommodation that would, in the view of the Departments, actually address the religious objections to the accommodation.

In the Departments' view, after considering all the comments and the preceding years of contention over this issue, it is appropriate to finalize the expanded exemptions rather than merely attempt to change the accommodation to satisfy religious objections. This is because if the accommodation still delivers contraceptive coverage through use of the objecting employer's plan, issuer, or third party administrator, it does not address the religious objections. If the accommodation could deliver contraceptive coverage independent and separate from the objecting employer's plan, issuer, and third party administrator, it could possibly address the religious objections, but there are two problems with such an approach. First, it would effectively be an exemption, not the accommodation as it has existed, so it would not be a reason not to offer the expanded exemptions finalized in these rules. Second, although (as explained above) the Departments have authority to provide exemptions to the Mandate, the Departments are not aware of the authority, or of a practical mechanism, for using section 2713(a)(4) to require contraceptive coverage be provided specifically to persons covered by an objecting employer, other than by using the employer's plan, issuer, or third party administrator, which would likely violate some entities'

religious objections. The Departments are aware of ways in which certain persons covered by an objecting employer might obtain contraceptive coverage through other governmental programs or requirements, instead of through objecting employers' plans, issuers, or third party administrators, and we mention those elsewhere in this rule. But those approaches do not involve the accommodation, they involve the expanded exemptions, plus the access to contraceptives through separate means.

## 2. Requiring Entities to Choose Between Compliance with the Contraceptive Mandate or the Accommodation Violated RFRA in Many Instances

Before the Religious IFC, the Departments had previously contended that the Mandate did not impose a substantial burden on entities and individuals under RFRA; that it was supported by a compelling government interest; and that it was, in combination with the accommodation, the least restrictive means of advancing that interest. With respect to the coverage Mandate itself, apart from the accommodation, and as applied to entities with sincerely held religious objections, that argument was rejected in *Hobby Lobby*, which held that the Mandate imposes a substantial burden and was not the least restrictive means of achieving any compelling governmental interest. *See* 134 S. Ct. at 2775–79. In the Religious IFC, the Departments revisited its earlier conclusions and reached a different view, concluding that requiring compliance through the Mandate or accommodation constituted a substantial burden on the religious exercise of many entities or individuals with religious objections, did not serve a compelling interest, and was not the least restrictive means of serving a compelling interest, so that requiring such compliance led to the violation of RFRA in many instances. (82 FR at 47806).

In general, commenters disagreed about this issue. Some commenters agreed with the Departments, and with some courts, that requiring entities to choose between the contraceptive Mandate and its accommoda-

<sup>15</sup>See RFI, 81 FR 47741 (July 26, 2016); Departments of Labor, Health and Human Services, and the Treasury, "FAQs, About Affordable Care Act Implementation Part 36," (Jan. 9, 2017), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36\\_1-9-17-Final.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36_1-9-17-Final.pdf) ("the comments reviewed by the Departments in response to the RFI indicate that no feasible approach has been identified at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage").



tion violated their rights under RFRA, because it imposed a substantial burden on their religious exercise, did not advance a compelling government interest, and was not the least restrictive means of achieving such an interest. Other commenters contended that requiring compliance either with the Mandate or the accommodation did not violate RFRA, agreeing with some courts that have concluded the accommodation does not substantially burden the religious exercise of organizations since, in their view, it does not require organizations to facilitate contraceptive coverage except by submitting a self-certification form or notice, and requiring compliance was the least restrictive means of advancing the compelling interest of providing contraceptive access to women covered by objecting entities' plans.

The Departments have examined further, including in light of public comments, the issue of whether requiring compliance with the combination of the contraceptive Mandate and the accommodation process imposes a substantial burden on entities that object to both, and is the least restrictive means of advancing a compelling government interest. The Departments now reaffirm the conclusion set forth in the Religious IFC, that requiring certain religiously objecting entities or individuals to choose between the Mandate, the accommodation, or incurring penalties for noncompliance imposes a substantial burden on religious exercise under RFRA.

#### a. Substantial Burden

The Departments concur with the description of substantial burdens expressed recently by the Department of Justice:

A governmental action substantially burdens an exercise of religion under RFRA if it bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice.

Because the government cannot second-guess the reasonableness of a religious belief or the adherent's as-

essment of the connection between the government mandate and the underlying religious belief, the substantial burden test focuses on the extent of governmental compulsion involved. In general, a government action that bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, will qualify as a substantial burden on the exercise of religion.<sup>16</sup>

The Mandate and accommodation under the previous regulation forced certain non-exempt religious entities to choose between complying with the Mandate, complying with the accommodation, or facing significant penalties. Various entities sincerely contended, in litigation or in public comments, that complying with either the Mandate or the accommodation was inconsistent with their religious observance or practice. The Departments have concluded that withholding an exemption from those entities has imposed a substantial burden on their exercise of religion, either by compelling an act inconsistent with that observance or practice, or by substantially pressuring the adherents to modify such observance or practice. To this extent, the Departments believe that the Court's analysis in *Hobby Lobby* extends, for the purposes of analyzing substantial burden, to the burdens that an entity faces when it opposes, on the basis of its religious beliefs, complying with the Mandate or participating in the accommodation process, and is subject to penalties or disadvantages that would have applied in this context if it chose neither. *See also Sharpe Holdings*, 801 F.3d at 942. Likewise, reconsideration of these issues has also led the Departments to conclude that the Mandate imposes a substantial burden on the religious beliefs of an individual employee who opposes coverage of some (or all) contraceptives in his or her plan on the basis of his or her religious beliefs, and would be able to obtain a plan that omits contraception from a willing employer or issuer (as applicable), but cannot obtain one solely because the Mandate

requires that employer or issuer to provide a plan that covers all FDA-approved contraceptives. The Departments disagree with commenters that contend the accommodation did not impose a substantial burden on religiously objecting entities, and agree with other commenters and some courts and judges that concluded the accommodation can be seen as imposing a substantial burden on religious exercise in many instances.

#### b. Compelling Interest

Although the Departments previously took the position that the application of the Mandate to certain objecting employers was necessary to serve a compelling governmental interest, the Departments have concluded, after reassessing the relevant interests and, in light of the public comments received, that it does not. This is based on several independent reasons.

First, as discussed above, the structure of section 2713(a)(4) and the ACA evince a desire by Congress to grant a great amount of discretion on the issue of whether, and to what extent, to require contraceptive coverage in health plans pursuant to section 2713(a)(4). This informs the Departments' assessment of whether the interest in mandating the coverage constitutes a compelling interest, as doing so imposes a substantial burden on religious exercise. As the Department of Justice has explained, "[t]he strict scrutiny standard applicable to RFRA is exceptionally demanding," and "[o]nly those interests of the highest order can outweigh legitimate claims to the free exercise of religion, and such interests must be evaluated not in broad generalities but as applied to the particular adherent."<sup>17</sup>

Second, since the day the contraceptive Mandate came into effect in 2011, the Mandate has not applied in many circumstances. To begin, the ACA does not apply the Mandate, or any part of the preventive services coverage requirements, to grandfathered plans. To continue, the Departments under the last Administration provided exemptions to the Mandate and expanded those exemptions through multi-

<sup>16</sup>See Federal Law Protections for Religious Liberty, 82 FR 49668, 49669 (Oct. 26, 2017).

<sup>17</sup>*Id.* at 49670.

ple rulemaking processes. Those rulemaking processes included an accommodation that effectively left employees of many non-exempt religious nonprofit entities without contraceptive coverage, in particular with respect to self-insured church plans exempt from ERISA. Under the previous accommodation, once a self-insured church plan filed a self-certification or notice, the accommodation relieved it of any further obligation with respect to contraceptive services coverage. Having done so, the accommodation process would generally have transferred the obligation to provide or arrange for contraceptive coverage to a self-insured plan's third party administrator (TPA). But the Departments recognized that they lack authority to compel church plan TPAs to provide contraceptive coverage or levy fines against those TPAs for failing to provide it. This is because church plans are exempt from ERISA pursuant to section 4(b)(2) of ERISA. Section 2761(a) of the PHS Act provides that States may enforce the provisions of title XXVII of the PHS Act as they pertain to health insurance issuers, but does not apply to church plans that do not provide coverage through a policy issued by a health insurance issuer. The combined result of PHS Act section 2713's authority to remove contraceptive coverage obligations from self-insured church plans, and HHS's and DOL's lack of authority under the PHS Act or ERISA to require TPAs of those plans to provide such coverage, led to significant disparity in the requirement to provide contraceptive coverage among nonprofit organizations with religious objections to the coverage.

Third party administrators for some, but not all, religious nonprofit organizations were subject to enforcement for failure to provide contraceptive coverage under the accommodation, depending on whether they administer a self-insured church plan. Notably, many of those nonprofit organizations were not houses of worship or integrated auxiliaries. Under section 3(33)(C) of ERISA, organizations whose employees participate in self-insured church plans need not be churches so long as they are controlled by or "share[] common reli-

gious bonds and convictions with" a church or convention or association of churches. The effect is that many similar religious organizations were being treated differently with respect to their employees receiving contraceptive coverage based solely on whether organization employees participate in a church plan.

This arrangement encompassed potentially hundreds of religious non-profit organizations that were not covered by the exemption for houses of worship and integrated auxiliaries. For example, the Departments were sued by two large self-insured church plans—Guidestone and Christian Brothers.<sup>18</sup> Guidestone is a plan organized by the Southern Baptist convention that covers 38,000 employers, some of which are exempt as churches or integrated auxiliaries, and some of which are not. Christian Brothers is a plan that covers Catholic churches and integrated auxiliaries and has said in litigation that it covers about 500 additional entities that are not exempt as churches. In several other lawsuits challenging the Mandate, the previous Administration took the position that some plans established and maintained by houses of worship but that included entities that were not integrated auxiliaries, were church plans under section 3(33) of ERISA and, thus, the Government "has no authority to require the plaintiffs' TPAs to provide contraceptive coverage at this time." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232, 242 (E.D.N.Y. 2013).

Third, the Departments now believe the administrative record on which the Mandate rested was—and remains—insufficient to meet the high threshold to establish a compelling governmental interest in ensuring that women covered by plans of objecting organizations receive cost-free contraceptive coverage through those plans. The Mandate is not narrowly tailored to advance the government's interests and appears both overinclusive and underinclusive. It includes some entities where a contraceptive coverage requirement seems unlikely to be effective, such as religious organizations of certain faiths,

which, according to commenters, primarily hire persons who agree with their religious views or make their dedication to their religious views known to potential employees who are expected to respect those views. The Mandate also does not apply to a significant number of entities encompassing many employees and for-profit businesses, such as grandfathered plans. And it does not appear to target the population defined, at the time the Guidelines were developed, as being the most at-risk of unintended pregnancy, that is, "women who are aged 18 to 24 years and unmarried, who have a low income, who are not high school graduates, and who are members of a racial or ethnic minority."<sup>19</sup> Rather than focusing on this group, the Mandate is a broad-sweeping requirement across employer-provided coverage and the individual and group health insurance markets.

The Department received conflicting comments on this issue. Some commenters agreed that the government does not have a compelling interest in applying the Mandate to objecting religious employers. They noted that the expanded exemptions will impact only a small fraction of women otherwise affected by the Mandate and argued that refusing to provide those exemptions would fail to satisfy the compelling interest test. Other commenters, however, argued that the government has a broader interest in the Mandate because all women should be considered at-risk of unintended pregnancy. But the Institute of Medicine (IOM), in discussing whether contraceptive coverage is needed, provided a very specific definition of the population of women most at-risk of unintended pregnancy.<sup>20</sup> The Departments believe it is appropriate to consider the government's interest in the contraceptive coverage requirement using the definition that formed the basis of that requirement and the justifications the Departments have offered for it since 2011. The Mandate, by its own terms, applies not just to women most at-risk of unintended pregnancy as identified by the IOM, but applies to any non-grandfathered "group

<sup>18</sup>The Departments take no view on the status of particular plans under the Employee Retirement Income Security Act of 1974 (ERISA), but simply make this observation for the purpose of seeking to estimate the impact of these final rules.

<sup>19</sup>Institute of Medicine, "Clinical Preventive Services for Women: Closing the Gaps" at 102 (2011).

<sup>20</sup>Id.

health plan and a health insurance issuer offering group or individual health insurance coverage.” PHS Act section 2713(a). Similarly, the exemptions and accommodation in previous rules, and the expanded exemptions in these rules, do not apply only to coverage for women most at-risk of unintended pregnancy, but to plans where a qualifying objection exists based on sincerely held religious beliefs without regard to the types of women covered in those plans. Seen in this light, the Departments believe there is a serious question whether the administrative record supports the conclusion that the Mandate, as applied to religious objectors encompassed by the expanded exemptions, is narrowly tailored to achieve the interests previously identified by the government. Whether and to what extent it is certain that an interest in health is advanced by refraining from providing expanded religious exemptions is discussed in more detail below in section II.F., Health Effects of Contraception and Pregnancy.

Fourth, the availability of contraceptive coverage from other possible sources—including some objecting entities that are willing to provide some (but not all) contraceptives, or from other governmental programs for low-income women—detracts from the government’s interest to refuse to expand exemptions to the Mandate. The Guttmacher Institute recently published a study that concluded, “[b]etween 2008 and 2014, there were no significant changes in the overall proportion of women who used a contraceptive method both among all women and among women at risk of unintended pregnancy,” and “there was no significant increase in the use of methods that would have been covered under the ACA (most or moderately effective methods) during the most recent time period (2012–2014) excepting small increases in implant use.”<sup>21</sup> In discussing why they did not see such an effect from the Mandate, the authors suggested that “[p]rior to the implementation of the ACA, many women were able to access contraceptive methods at low or no cost through publicly funded family planning centers and Medicaid; existence of these safety net programs may have dampened any impact that the ACA could have

had on contraceptive use. In addition, cost is not the only barrier to accessing a full range of method options,” and “[t]he fact that income is not associated with use of most other methods [besides male sterilization and withdrawal] obtained through health care settings may reflect broader access to affordable and/or free contraception made possible through programs such as Title X.”

Fifth, the Departments previously created the accommodation, in part, as a way to provide for payments of contraceptives and sterilization in a way that is “seamless” with the coverage that eligible employers provide to their plan participants and their beneficiaries. (80 FR 41318). As noted above, some commenters contended that seamlessness between contraceptive coverage and employer sponsored insurance is important and is a compelling governmental interest, while other commenters disagreed. Neither Congress, nor the Departments in other contexts, have concluded that seamlessness, as such, is a compelling interest in the federal government’s delivery of contraceptive coverage. For example, the preventive services Mandate itself does not require contraceptive coverage and does not apply to grandfathered plans, thereby failing to guarantee seamless contraceptive coverage. The exemption for houses of worship and integrated auxiliaries, and the application of the accommodation to certain self-insured church plans, also represents a failure to achieve seamless contraceptive coverage. HHS’s Title X program provides contraceptive coverage in a way that is not necessarily seamless with beneficiaries’ employer sponsored insurance plans. After reviewing the public comments and reconsidering this issue, the Departments no longer believe that if a woman working for an objecting religious employer receives contraceptive access in ways that are not seamless to her employer sponsored insurance, a compelling government interest has nevertheless been undermined. Therefore the Departments conclude that guaranteeing seamlessness between contraceptive access and employer sponsored insurance does not constitute a compelling interest that overrides employ-

ers’ religious objections to the contraceptive Mandate.

Some commenters contended that obtaining contraceptive coverage from other sources could be more difficult or more expensive for women than obtaining it from their group health plan or health insurance plan. The Departments do not believe that such differences rise to the level of a compelling interest or make it inappropriate for us to issue the expanded exemptions set forth in these final rules. Instead, after considering this issue, the Departments conclude that the religious liberty interests that would be infringed if we do not offer the expanded exemptions are not overridden by the impact on those who will no longer obtain contraceptives through their employer sponsored coverage as a result. This is discussed in more detail in following section, II.D., Burdens on Third Parties.

#### *D. Burdens on Third Parties*

The Departments received a number of comments on the question of burdens that these rules might impose on third parties. Some commenters asserted that the expanded exemptions and accommodation do not impose an impermissible or unjustified burden on third parties, including on women who might not otherwise receive contraceptive coverage with no cost-sharing. These included commenters agreeing with the Departments’ explanations in the Religious IFC, stating that unintended pregnancies were decreasing before the Mandate was implemented, and asserting that any benefit that third parties might receive in getting contraceptive coverage does not justify forcing religious persons to provide such products in violation of their beliefs. Other commenters disagreed, asserting that the expanded exemptions unacceptably burden women who might lose contraceptive coverage as a result. They contended the exemptions may remove contraceptive coverage, causing women to have higher contraceptive costs, fewer contraceptive options, less ability to use contraceptives more consistently, more unintended pregnan-

<sup>21</sup>M.L. Kavanaugh et al., Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, 97 *Contraception* 14, 14–21 (2018), available at [http://www.contraceptionjournal.org/article/S0010-7824\(17\)30478-X/pdf](http://www.contraceptionjournal.org/article/S0010-7824(17)30478-X/pdf).



cies,<sup>22</sup> births spaced more closely, and workplace, economic, or societal inequality. Still other commenters took the view that other laws or protections, such as those found in the First or Fifth Amendments, prohibit the expanded exemptions, which those commenters view as prioritizing religious liberty of exempted entities over the religious liberty, conscience, or choices of women who would not receive contraceptive coverage where an exemption is used.

The Departments note that the exemptions in the Religious IFC and these final rules, like the exemptions created by the previous Administration, do not impermissibly burden third parties. Initially, the Departments observe that these final rules do not create a governmental burden; rather, they relieve a governmental burden. The ACA did not impose a contraceptive coverage requirement. HHS exercised discretion granted to HRSA by the Congress to include contraceptives in the Guidelines issued under section 2713(a)(4). That decision is what created and imposed a governmental burden. These rules simply relieve part of that governmental burden. If some third parties do not receive contraceptive coverage from private parties who the government chose not to coerce, that result exists in the absence of governmental action—it is not a result the government has imposed. Calling that result a governmental burden rests on an incorrect presumption: that the government has an obligation to force private parties to benefit those third parties and that the third parties have a right to those benefits. But Congress did not create a right to receive contraceptive coverage from other private citizens through PHS Act section 2713, other portions of the ACA, or any other statutes it has enacted. Although some commenters also contended such a right might exist under treaties the Senate has ratified or the Constitution, the Departments are not aware of any source demonstrating that the Constitution or a treaty ratified by the Senate creates a right to receive contraceptive coverage from other private citizens.

The fact that the government at one time exercised its administrative discre-

tion to require private parties to provide coverage to benefit other private parties, does not prevent the government from relieving some or all of the burden of its Mandate. Otherwise, any governmental coverage requirement would be a one-way ratchet. In the Religious IFC and these rules, the government has simply restored a zone of freedom where it once existed. There is no statutory or constitutional obstacle to the government doing so, and the doctrine of third-party burdens should not be interpreted to impose such an obstacle. Such an interpretation would be especially problematic given the millions of women, in a variety of contexts, whom the Mandate does not ultimately benefit, notwithstanding any expanded exemptions—including through grandfathering of plans, the previous religious exemptions, and the failure of the accommodation to require delivery of contraceptive coverage in various self-insured church plan contexts.

In addition, the Government is under no constitutional obligation to fund contraception. *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (holding that, although the Supreme Court has recognized a constitutional right to abortion, there is no constitutional obligation for government to pay for abortions). Even more so may the Government refrain from requiring private citizens, in violation of their religious beliefs, to cover contraception for other citizens. *Cf. Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”). The constitutional rights of liberty and privacy do not require the government to force private parties to provide contraception to other citizens and do not prohibit the government from protecting religious objections to such governmental mandates, especially where, as here, the mandate is not an explicit statutory requirement.<sup>23</sup> The Departments do not believe that the Constitution prohibits offering the expanded exemptions in these final rules.

As the Department of Justice has observed, the fact that exemptions may re-

lieve a religious adherent from conferring a benefit on a third party “does not categorically render an exemption unavailable,” and RFRA still applies.<sup>24</sup> The Departments conclusion on this matter is consistent with the Supreme Court’s observation that RFRA may require exemptions even from laws requiring claimants “to confer benefits on third parties.” *See Hobby Lobby*, 134 S. Ct. at 2781 n.37. Here, no law contains such a requirement, but the Mandate is derived from an administrative exercise of discretion that Congress charged HRSA and the Departments with exercising. Burdens that may affect third parties as a result of revisiting the exercise of agency discretion may be relevant to the RFRA analysis, but they cannot be dispositive. “Otherwise, for example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants).” *Id.*

When government relieves burdens on religious exercise, it does not violate the Establishment Clause; rather, “it follows the best of our traditions.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The Supreme Court’s cases “leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.” *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994). Rather, the Supreme Court “has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136,

<sup>22</sup>Some commenters attempted to quantify the costs of unintended pregnancy, but failed to persuasively estimate the population of women that this exemption may affect.

<sup>23</sup>*See, for example, Planned Parenthood Ariz., Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 196 (Ariz. Ct. App. 2011) (“[A] woman’s right to an abortion or to contraception does not compel a private person or entity to facilitate either.”).

<sup>24</sup>*See Federal Law Protections for Religious Liberty*, 82 FR at 49670.

144–45 (1987)). “[T]here is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.” *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (internal quotation omitted). Thus, the Supreme Court has upheld a broad range of accommodations against Establishment Clause challenges, including the exemption of religious organizations from Title VII’s prohibition against discrimination in employment on the basis of religion, see *Amos*, 483 U.S. at 335–39; a state property tax exemption for religious organizations, see *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 672–80 (1970); and a state program releasing public school children during the school day to receive religious instruction at religious centers, see *Zorach*, 343 U.S. at 315.

Before 2012 (when HRSA’s Guidelines went into effect), there was no federal women’s preventive services coverage mandate imposed nationally on health insurance and group health plans. The ACA did not require contraceptives to be included in HRSA’s Guidelines, and it did not require any preventive services required under PHS Act section 2713 to be covered by grandfathered plans. Many States do not impose contraceptive coverage mandates, or they offer religious exemptions to the requirements of such coverage mandates—exemptions that have not been invalidated by federal or State courts. The Departments, in previous regulations, exempted houses of worship and integrated auxiliaries from the Mandate. The Departments then issued a temporary enforcement safe harbor allowing religious nonprofit groups to not provide contraceptive coverage under the Mandate for almost two additional years. The Departments further expanded the houses of worship and integrated auxiliaries exemption through definitional changes. And the Departments created an accommodation process under which many women in self-insured church plans may not ultimately receive contraceptive coverage. In addition, many organizations have not been subject to the Mandate in practice because of injunctions they received through litigation, protecting them from federal imposition of the Mandate, including under

several recently entered permanent injunctions that will apply regardless of the issuance of these final rules.

Commenters offered various assessments of the impact these rules might have on state or local governments. Some commenters said that the expanded exemptions will not burden state or local governments, or that such burdens should not prevent the Departments from offering those exemptions. Others said that if the Departments provide expanded exemptions, states or local jurisdictions may face higher costs in providing birth control to women through government programs. The Departments consider it appropriate to offer expanded exemptions, notwithstanding the objection of some state or local governments. The ACA did not require a contraceptive Mandate, and its discretionary creation by means of HRSA’s Guidelines does not translate to a benefit that the federal government owes to states or local governments. We are not aware of instances where the various situations recited in the previous paragraph, in which the federal government has not imposed contraceptive coverage (other than through the Religious and Moral IFCs), have been determined to cause a cognizable injury to state or local governments. Some states that were opposed to the IFCs submitted comments objecting to the potential impacts on their programs resulting from the expanded exemptions, but they did not adequately demonstrate that such impacts would occur, and they did not explain whether, or to what extent, they were impacted by the other kinds of instances mentioned above in which no federal mandate of contraceptive coverage has applied to certain plans. The Departments find no legal prohibition on finalizing these rules based on the speculative suggestion of an impact on state or local governments, and we disagree with the suggestion that once we have exercised our discretion to deny exemptions—no matter how recently or incompletely—we cannot change course if some state and local governments believe they are receiving indirect benefits from the previous decision.

In addition, these expanded exemptions apply only to a small fraction of entities to which the Mandate would otherwise apply—those with qualifying religious objections. Public comments did not provide reliable data on how many entities

would use these expanded religious exemptions, in which states women in such plans would reside, how many of those women would qualify for or use state and local government subsidies of contraceptives as a result, or in which states such women, if they are low income, would go without contraceptives and potentially experience unintended pregnancies that state Medicaid programs would have to cover. As mentioned above, at least one study, published by the Guttmacher Institute, concluded the Mandate has caused no clear increase in contraceptive use; one explanation proposed by the authors of the study is that women eligible for family planning from safety net programs were already receiving free or subsidized contraceptive access through them, notwithstanding the Mandate’s effects on the overall market. Some commenters who opposed the expanded exemptions admitted that this information is unclear at this stage; other commenters that estimated considerably more individuals and entities would seek an exemption also admitted the difficulty of quantifying estimates.

In the discussion below concerning estimated economic impacts of these rules, the Departments explain there is not reliable data available to accurately estimate the number of women who may lose contraceptive coverage under these rules, and the Departments set forth various reasons why it is difficult to know how many entities will use these exemptions or how many women will be impacted by those decisions. Solely for the purposes of determining whether the rules have a significant economic impact under Executive Order 12,866, and in order to estimate the broadest possible impact so as to determine the applicability of the procedures set forth in that Executive Order, the Departments propose that the rules will affect no more than 126,400 women of childbearing age who use contraceptives covered by the Guidelines, and conclude the economic impact falls well below \$100 million. As explained below, that estimate assumes that a certain percentage of employers which did not cover contraceptives before the ACA will use these exemptions based on sincerely held religious beliefs. The Departments do not actually know that such entities will do so, however, or that they operate based on



sincerely held religious beliefs against contraceptive coverage. The Departments also explain that other exemptions unaffected by these rules may encompass many or most women potentially affected by the expanded exemptions. In other words, the houses of worship and integrated auxiliaries exemption, the accommodation's failure to require contraceptive coverage in certain self-insured church plans, the non-applicability of PHS Act section 2713 to grandfathered plans, and the permanent injunctive relief many religious litigants have received against section 2713(a)(4), may encompass a large percentage of women potentially affected by religious objections, and therefore many women in those plans may not be impacted by these rules at all. In addition, even if 126,400 women might be affected by these rules, that number constitutes less than 0.1% of all women in the United States.<sup>25</sup> This suggests that if these rules have any impact on state or local governments, it will be statistically de minimus. The Departments conclude that there is insufficient evidence of a potential negative impact of these rules on state and local governments to override the appropriateness of deciding to finalize these rules.

Some commenters contended that the expanded exemptions would constitute unlawful sex discrimination, such as under section 1557 of the Affordable Care Act, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, or the Fifth Amendment. Some commenters suggested the expanded exemptions would discriminate on bases such as race, disability, or LGBT status, or that they would disproportionately burden certain persons in such categories.

But these final rules do not discriminate or draw any distinctions on the basis of sex, pregnancy, race, disability, socioeconomic class, LGBT status, or otherwise, nor do they discriminate on any unlawful grounds. The expanded exemptions in these rules do not authorize enti-

ties to comply with the Mandate for one person, but not for another person, based on that person's status as a member of a protected class. Instead they allow entities that have sincerely held religious objections to providing some or all contraceptives included in the Mandate to not be forced to provide coverage of those items to anyone.

These commenters' contentions about discrimination are unpersuasive for still additional reasons. First, Title VII is applicable to discrimination committed by employers, and these rules have been issued in the government's capacity as a regulator of group health plans and group and individual health insurance, not an employer. *See also In Re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 940–42 & n.1 (8th Cir. 2007) (holding that Title VII “does not require coverage of contraception because contraception is not a gender-specific term like potential pregnancy, but rather applies to both men and women”). Second, these rules create no disparate impact. The women's preventive services mandate under section 2713(a)(4), and the contraceptive Mandate promulgated under such preventive services mandate, already inures to the specific benefit of women—men are denied any benefit from that section. Both before and after these final rules, section 2713(a)(4) and the Guidelines issued under that section treat women's preventive services in general, and female contraceptives specifically, more favorably than they treat male preventive services or male contraceptives.

It is simply not the case that the government's implementation of section 2713(a)(4) is discriminatory against women because exemptions are expanded to encompass religious objections. The previous regulations, as discussed elsewhere herein, do not require contraceptive coverage in a host of plans, including grandfathered plans, plans of houses of worship, and—through inability to enforce the accommodation on certain third party admin-

istrators—plans of many religious non-profits in self-insured church plans. Below, the Departments estimate that few women of childbearing age in the country will be affected by these expanded exemptions.<sup>26</sup> In this context, the Departments do not believe that an adjustment to discretionary Guidelines for women's preventive services concerning contraceptives constitutes unlawful sex discrimination. Otherwise, anytime the government exercises its discretion to provide a benefit that is specific to women (or specific to men), it would constitute sex discrimination for the government to reconsider that benefit. Under that theory, *Hobby Lobby* itself, and RFRA (on which *Hobby Lobby*'s holding was based), which provided a religious exemption to this Mandate for many businesses, would be deemed discriminatory against women because the underlying women's preventive services requirement is a benefit for women, not for men. Such conclusions are not consistent with legal doctrines concerning sex discrimination.

It is not clear that these expanded exemptions will significantly burden women most at risk of unintended pregnancies. Some commenters observed that contraceptives are often readily accessible at relatively low cost. Other commenters disagreed. Some objected to the suggestion in the Religious IFC that many forms of contraceptives are available for around \$50 per month and other forms, though they bear a higher one-time cost, cost a similar amount over the duration of use. But some of those commenters cited sources maintaining that birth control pills can cost up to \$600 per year (that is, \$50 per month), and said that IUDs, which can last three to six years or more,<sup>27</sup> can cost \$1,100 (that is, less than \$50 per month over the duration of use). Some commenters said that, for lower income women, contraceptives can be available at free or low cost through government programs (federal programs offering such services include, for example, Medicaid, Title X,

<sup>25</sup>U.S. Census Bureau, “Quick Facts: Population Estimates, July 1, 2017” (estimating 325,719,178 persons in the U.S., 50.8% of which are female), available at <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

<sup>26</sup>Below, the Departments estimate that no more than 126,400 women of childbearing age will be affected by the expanded exemptions. As noted above, this is less than 0.1% of the over 165 million women in the United States. The Departments previously estimated that, at most 120,000 women of childbearing age would be affected by the expanded exemptions. *See* Religious IFC, 82 FR 47,823–84.

<sup>27</sup>*See, for example*, Planned Parenthood, “IUD,” <https://www.plannedparenthood.org/learn/birth-control/iud>.

community health center grants, and Temporary Assistance for Needy Families (TANF)). Other commenters contended that many women in employer-sponsored coverage might not qualify for those programs, although that sometimes occurs because their incomes are above certain thresholds or because the programs were not intended to absorb privately insured individuals. Some commenters observed that contraceptives may be available through other sources, such as a plan of another family member and that the expanded exemptions will not likely encompass a very large segment of the population otherwise benefitting from the Mandate. Other commenters disagreed, pointing out that some government programs that provide family planning have income and eligibility thresholds, so that women earning certain amounts above those levels would need to pay full cost for contraceptives if they were no longer covered in their health plans.

The Departments do not believe that these general considerations make it inappropriate to issue the expanded exemptions set forth in these rules. In addition, the Departments note that the HHS Office of Population Affairs, within the Office of the Assistant Secretary for Health, has recently issued a proposed regulation to amend the regulations governing its Title X family planning program. The proposed regulation would amend the definition of “low income family”—individuals eligible for free or low cost contraceptive services—to include women who are unable to obtain certain family planning services under their employer-sponsored health coverage due to their employers’ religious beliefs or moral convictions (see 83 FR 25502). If that regulation is finalized as proposed, it could further reduce any potential effect of these final rules on women’s access to contraceptives. That proposal also demonstrates that the government has other means available to it for increasing women’s access to contraception. Some of those means are less restrictive of religious exercise than imposition of the contraceptive Mandate on employers with sincerely held religious objections to providing such coverage.

Some commenters stated that the expanded exemptions would violate section 1554 of the ACA. That section says the

Secretary of HHS “shall not promulgate any regulation” that “creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care,” “impedes timely access to health care services,” “interferes with communications regarding a full range of treatment options regarding a full range of treatment options between the patient and the provider,” “restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions,” “violates the principles of informed consent and the ethical standards of health care professionals,” or “limits the availability of health care treatment for the full duration of a patient’s medical needs.” 42 U.S.C. 18114. Such commenters urged, for example, that the Religious IFC created unreasonable barriers to the ability of individuals to obtain appropriate medical care, particularly in areas they said may have a disproportionately high number of entities likely to take advantage of the exemption.

The Departments disagree with these comments about section 1554. The Departments issued previous exemptions and accommodations that allowed various plans to not provide contraceptive coverage on the basis of religious objections. The Departments, which administer both ACA section 1554 and PHS Act section 2713, did not conclude that the exemptions or accommodations in those regulations violated section 1554. Moreover, the decision not to impose a governmental mandate is not the “creation” of a “barrier,” especially when that mandate requires private citizens to provide services to other private citizens. Nor, in any event, are the exemptions from the Mandate unreasonable. Section 1554 of the ACA does not require the Departments to require coverage of, or to keep in place a requirement to cover, certain services, including contraceptives, that was issued pursuant to HHS’s exercise of discretion under section 2713(a)(4). Nor does section 1554 prohibit the Departments from providing exemptions for burdens on religious exercise, or, as is the case here, from refraining to impose the Mandate in cases where religious exercise would be burdened by it. In light of RFRA and the First Amendment, providing religious exemptions is a reasonable administrative response in the context of this federally mandated burden,

especially since the burden itself is a sub-regulatory creation that does not apply in various contexts. Religious exemptions from federal mandates in sensitive health contexts have existed in federal laws for decades, and President Obama referenced them when he issued Executive Order 13535 (March 24, 2010), declaring that, under the ACA, “longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact,” and that “[n]umerous executive agencies have a role in ensuring that these restrictions are enforced, including the HHS.” While the text of Executive Order 13535 does not require the expanded exemptions issued in these rules, the expanded exemptions are, as explained below, consistent with longstanding federal laws to protect religious beliefs.

In short, the Departments do not believe sections 1554 or 1557 of the ACA, other nondiscrimination statutes, or any constitutional doctrines, create an affirmative obligation to create, maintain, or impose a Mandate that forces covered entities to provide coverage of preventive contraceptive services in health plans. The ACA’s grant of authority to HRSA to provide for, and support, the Guidelines is not transformed by any of the laws cited by commenters into a requirement that, once those Guidelines exist, they can never be reconsidered or amended because doing so would only affect women’s coverage or would allegedly impact particular populations disparately.

Members of the public have widely divergent views on whether expanding the exemptions is good public policy. Some commenters said the exemptions would burden workers, families, and the economic and social stability of the country, and interfere with the physician-patient relationship. Other commenters disagreed, favoring the public policy behind expanding the exemptions and arguing that the exemptions would not interfere with the physician-patient relationship. For all the reasons explained at length in this preamble, the Departments have determined that these rules are good policy. Because of the importance of the religious liberty values being accommodated, the limited impact of these rules, and uncer-

tainty about the impact of the Mandate overall according to some studies, the Departments do not believe these rules will have any of the drastic negative consequences on third parties or society that some opponents of these rules have suggested.

### E. Interim Final Rulemaking

The Departments received several comments about their decision to issue the Religious IFC as interim final rules with requests for comments, instead of as a notice of proposed rulemaking. Several commenters asserted that the Departments had the authority to issue the Religious IFC in that way, agreeing that the Departments had explicit statutory authority to do so, good cause under the Administrative Procedure Act (APA), or both. Other commenters held the opposite view, contending that there was neither statutory authority to issue the rules on an interim final basis, nor good cause under the APA to make the rules immediately effective.

The Departments continue to believe legal authority existed to issue the Religious IFC as interim final rules. Section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act authorize the Secretaries of the Treasury, Labor, and

HHS (collectively, the Secretaries) to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include sections 2701 through 2728 of the PHS Act and the incorporation of those sections into section 715 of ERISA and section 9815 of the Code. The Religious and Moral IFCs fall under those statutory authorizations for the use of interim final rulemaking. Prior to the Religious IFC, the Departments issued three interim final rules implementing this section of the PHS Act because of the needs of covered entities for immediate guidance and the weighty matters implicated by the HRSA Guidelines, including issuance of new or revised exemptions or accommodations. (75 FR 41726; 76 FR 46621; 79 FR 51092). The Departments also had good cause to issue the Religious IFC as interim final rules, for the reasons discussed therein.

In any event, the objections of some commenters to the issuance of the Religious IFC as interim final rules with request for comments does not prevent the issuance of these final rules. These final rules are being issued after receiving and thoroughly considering public comments

as requested in the Religious IFC. These final rules therefore comply with the APA's notice and comment requirements.

### F. Health Effects of Contraception and Pregnancy

The Departments received numerous comments on the health effects of contraception and pregnancy. As noted above, some commenters supported the expanded exemptions, and others urged that contraceptives be removed from the Guidelines entirely, based on the view that pregnancy and the unborn children resulting from conception are not diseases or unhealthy conditions that are properly the subject of preventive care coverage. Such commenters further contended that hormonal contraceptives may present health risks to women. For example, they contended that studies show certain contraceptives cause or are associated with an increased risk of depression,<sup>28</sup> venous thromboembolic disease,<sup>29</sup> fatal pulmonary embolism,<sup>30</sup> thrombotic stroke and myocardial infarction (particularly among women who smoke, are hypertensive, or are older),<sup>31</sup> hypertension,<sup>32</sup> HIV-1 acquisition and transmission,<sup>33</sup> and breast, cervical, and liver cancers.<sup>34</sup> Some commenters also observed that fertility awareness based methods of birth spacing

<sup>28</sup>Commenters cited Charlotte Wessel Skovlund et al., "Association of Hormonal Contraception with Depression," 73 *JAMA Psychiatry* 1154, 1154 (published online Sept. 28, 2016) ("Use of hormonal contraception, especially among adolescents, was associated with subsequent use of antidepressants and a first diagnosis of depression, suggesting depression as a potential adverse effect of hormonal contraceptive use.")

<sup>29</sup>Commenters cited the Practice Committee of the American Society for Reproductive Medicine, "Hormonal Contraception: Recent Advances and Controversies," 82 *Fertility and Sterility* S20, S26 (2004); V.A. Van Hylckama et al., "The Venous Thrombotic Risk of Oral Contraceptives, Effects of Estrogen Dose and Progestogen Type: Results of the MEGA Case-Control Study," 339 *Brit. Med. J.* 339b2921 (2009); Y. Vinogradova et al., "Use of Combined Oral Contraceptives and Risk of Venous Thromboembolism: Nested Case-Control Studies Using the QResearch and CPRD Databases," 350 *Brit. Med. J.* 350h2135 (2015) ("Current exposure to any combined oral contraceptive was associated with an increased risk of venous thromboembolism . . . compared with no exposure in the previous year."); Ø. Lidegaard et al., "Hormonal contraception and risk of venous thromboembolism: national follow-up study," 339 *Brit. Med. J.* b2890 (2009); M. de Bastos et al., "Combined oral contraceptives: venous thrombosis," *Cochrane Database Syst. Rev.* (no. 3, 2014). CD010813. doi: 10.1002/14651858.CD010813.pub2, available at <https://www.ncbi.nlm.nih.gov/pubmed?term=24590565>; L.J. Havrilesky et al., "Oral Contraceptive User for the Primary Prevention of Ovarian Cancer," Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013), available at <https://archive.ahrq.gov/research/findings/evidence-based-reports/ocusetp.html>; and Robert A. Hatcher et al., *Contraceptive Technology* 405–07 (Arden Media 18th rev. ed. 2004).

<sup>30</sup>Commenters cited N.R. Poulter, "Risk of Fatal Pulmonary Embolism with Oral Contraceptives," 355 *Lancet* 2088 (2000).

<sup>31</sup>Commenters cited Ø. Lidegaard et al., "Thrombotic Stroke and Myocardial Infarction with Hormonal Contraception," 366 *N. Eng. J. Med.* 2257, 2257 (2012) (risks "increased by a factor of 0.9 to 1.7 with oral contraceptives that included ethinyl estradiol at a dose of 20 µg and by a factor of 1.3 to 2.3 with those that included ethinyl estradiol at a dose of 30 to 40 µg"); Practice Committee of the American Society for Reproductive Medicine, "Hormonal Contraception"; M. Vessey et al., "Mortality in Relation to Oral Contraceptive Use and Cigarette Smoking," 362 *Lancet* 185, 185–91 (2003); WHO Collaborative Study of Cardiovascular Disease and Steroid Hormone Contraception, "Acute Myocardial Infarction and Combined Oral Contraceptives: Results of an International Multicentre Case-Control Study," 349 *Lancet* 1202, 1202–09(1997); K.M. Curtis et al., "Combined Oral Contraceptive Use Among Women With Hypertension: A Systematic Review," 73 *Contraception* 73179, 179–88 (2006); L.A. Gillum et al., "Ischemic stroke risk with oral contraceptives: A meta analysis," 284 *JAMA* 72, 72–78 (2000), available at <https://www.ncbi.nlm.nih.gov/pubmed/10872016>; and Robert A. Hatcher et al., *Contraceptive Technology* 404–05, 445 (Arden Media 18th rev. ed. 2004).

<sup>32</sup>Commenters cited Robert A. Hatcher et al., *Contraceptive Technology* 407, 445 (Arden Media 18th rev. ed. 2004).

<sup>33</sup>Commenters cited Renee Heffron et al., "Use of Hormonal Contraceptives and Risk of HIV-1 Transmission: A Prospective Cohort Study," 12 *Lancet Infectious Diseases* 19, 24 (2012) ("Use of hormonal contraceptives was associated with a two-times increase in the risk of HIV-1 acquisition by women and HIV-1 transmission from women to men."); and "Hormonal Contraception Doubles HIV Risk, Study Suggests," *Science Daily* (Oct. 4, 2011), <https://www.sciencedaily.com/releases/2011/10/111003195253.htm>.

<sup>34</sup>Commenters cited "Oral Contraceptives and Cancer Risk" (Mar. 21, 2012, National Cancer Institute (reviewed Feb. 22, 2018), <https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/oral-contraceptives-fact-sheet>); L.J. Havrilesky et al., "Oral Contraceptive User for the Primary Prevention of Ovarian Cancer," Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013), available at <https://archive.ahrq.gov/research/findings/evidence-based-reports/ocusetp.html>; S. N. Bhupathiraju et al., "Exogenous hormone use: Oral contraceptives, postmenopausal hormone therapy, and health outcomes in the Nurses' Health Study," 106 *Am. J. Pub. Health* 1631, 1631–37 (2016); The World Health Organization Department of Reproductive Health and Research, "The Carcinogenicity of Combined Hormonal Contraceptives and Combined Menopausal Treatment", World Health Organization (Sept. 2005), [http://www.who.int/reproductivehealth/topics/ageing/cocs\\_hrt\\_statement.pdf](http://www.who.int/reproductivehealth/topics/ageing/cocs_hrt_statement.pdf); and the American Cancer Society, "Known and Probably Human Carcinogens," American Cancer Society (rev. Nov. 3, 2016), <https://www.cancer.org/cancer/cancer-causes/general-info/known-and-probable-human-carcinogens.html>.



are free of similar health risks since they do not involve ingestion of chemicals. Some commenters contended that contraceptive access does not reduce unintended pregnancies or abortions.

Other commenters disagreed, citing a variety of studies they contend show health benefits caused by, or associated with, contraceptive use or the prevention of unintended pregnancy. Commenters cited, for example, the 2011 IOM Report's discussions of the negative effects associated with unintended pregnancies, as well as other studies. Such commenters contended that, by reducing unintended pregnancy, contraceptives reduce the risk of unaddressed health complications, low birth weight, preterm birth, infant mortality, and maternal mortality.<sup>35</sup> Commenters also said studies show contraceptives are associated with a reduced risk of conditions such as ovarian cancer, colorectal cancer, and endometrial cancer,<sup>36</sup> and that contraceptives treat such conditions as endometriosis, polycystic ovarian syndrome, migraines, pre-menstrual pain, menstrual regulation, and pelvic inflammatory disease.<sup>37</sup> Some commenters said that pregnancy presents various health risks, such as blood clots, bleeding, anemia, high blood pressure, gestational diabetes, and death. Some commenters also contended that increased access to contraception reduces abortions.

Some commenters said that, in the Religious IFC, the Departments made incorrect statements concerning scientific studies. For example, some commenters argued there is no proven increased risk of breast cancer or other risks among contraceptive users. They criticized the Religious IFC for citing studies, including one previewed in the 2011 IOM Report itself (Agency for Healthcare Research and Quality Report No.: 13-E002-EF (June 2013) (cited above)), discussing an association between contraceptive use and in-

creased risks of breast and cervical cancer, and concluding there are no net cancer-reducing benefits of contraceptive use. As described in the Religious IFC, 82 FR at 47804, the 2013 Agency for Healthcare Research and Quality study, and others, reach conclusions with which these commenters appear to disagree. The Departments consider it appropriate to take into account both of those studies, as well as the studies cited by commenters who disagree with those conclusions.

Some commenters further criticized the Departments for saying two studies cited by the 2011 IOM Report, which asserted an associative relationship between contraceptive use and decreases in unintended pregnancy, did not on their face establish a causal relationship between a broad coverage mandate and decreases in unintended pregnancy. In this respect, as noted in the Religious IFC,<sup>38</sup> the purpose for the Departments' reference to such studies was to highlight the difference between a causal relationship and an associative one, as well as the difference between saying contraceptive use has a certain effect and saying a contraceptive coverage mandate (or, more specifically, the part of that mandate affected by certain exemptions) will necessarily have (or negate, respectively) such an effect.

Commenters disagreed about the effects of some FDA-approved contraceptives on embryos. Some commenters agreed with the quotation, in the Religious IFC, of FDA materials<sup>39</sup> that indicate that some items it has approved as contraceptives may prevent the implantation of an embryo after fertilization. Some of those commenters cited additional scientific sources to argue that certain approved contraceptives may prevent implantation, and that, in some cases, some contraceptive items may even dislodge an embryo shortly after implantation. Other commenters disagreed with the sources cited

in the Religious IFC and cited additional studies on that issue. Some commenters further criticized the Departments for asserting in the Religious IFC that some persons believe those possible effects are "abortifacient."

The objection on this issue appears to be partially one of semantics. People disagree about whether to define "conception" or "pregnancy" to occur at fertilization, when the sperm and ovum unite, or days later at implantation, when that embryo has undergone further cellular development, travelled down the fallopian tube, and implanted in the uterine wall. This question is independent of the question of what mechanisms of action FDA-approved or cleared contraceptives may have. It is also a separate question from whether members of the public assert, or believe, that it is appropriate to consider the items "abortifacient"—that is, a kind of abortion, or a medical product that causes an abortion—because they believe abortion means to cause the demise of a post-fertilization embryo inside the mother's body. Commenters referenced scientific studies and sources on both sides of the issue of whether certain contraceptives prevent implantation. Commenters and litigants have positively stated that some of them view certain contraceptives as abortifacients, for this reason. *See also Hobby Lobby*, 134 U.S. at 2765 ("The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.").

The Departments do not take a position on the scientific, religious, or moral debates on this issue by recognizing that some people have sincere religious objections to providing contraception coverage on this basis. The Supreme Court has already recognized that such a view can form the basis of a sincerely held religious belief under RFRA.<sup>40</sup> Even though there is a plausible scientific argument against

<sup>35</sup>Citing, e.g., Conde-Agudelo A, Rosas-Bermudez A, Kafury-Goeta AC. Birth spacing and risk of adverse perinatal outcomes: a meta-analysis. *JAMA* 2006;295:1809–23, and John Hopkins Bloomberg Public Health School of Health, Contraception Use Averts 272,000 Maternal Deaths Worldwide, <https://www.jhsph.edu/news/news-releases/2012/ahmed-contraception.html>.

<sup>36</sup>Citing, e.g., Schindler, A.E. (2013). Non-contraceptive benefits of oral hormonal contraceptives. *International Journal of Endocrinology and Metabolism*, 11 (1), 41–47.

<sup>37</sup>Citing, e.g., id., and American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women. (2015, January). Committee Opinion Number 615: Access to Contraception. As discussed below, to the extent that contraceptives are prescribed to treat existing health conditions, and not for preventive purposes, the Mandate would not be applicable.

<sup>38</sup>82 FR at 47,803–04.

<sup>39</sup>FDA's guide "Birth Control: Medicines To Help You," specifies that various approved contraceptives, including Levonorgestrel, Ulipristal Acetate, and IUDs, work mainly by preventing fertilization and "may also work ... by preventing attachment (implantation) to the womb (uterus)" of a human embryo after fertilization. Available at <https://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm>.

<sup>40</sup>Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases)

the view that certain contraceptives have mechanisms of action that may prevent implantation, there is also a plausible scientific argument in favor of it—as demonstrated, for example, by FDA’s statement that some contraceptives may prevent implantation and by some scientific studies cited by commenters. The Departments believe in this context we have a sufficient rationale to offer expanded religious exemptions with respect to this Mandate.

The Departments also received comments about their discussion of the uncertain effects of the expanded exemptions on teen sexual activity. In this respect, the Departments stated, “With respect to teens, the Santelli and Melnikas study cited by IOM 2011 observes that, between 1960 and 1990, as contraceptive use increased, teen sexual activity outside of marriage likewise increased (although the study does not assert a causal relationship). Another study, which proposed an economic model for the decision to engage in sexual activity, stated that “[p]rograms that increase access to contraception are found to decrease teen pregnancies in the short run but increase teen pregnancies in the long run.”<sup>41</sup> Some commenters agreed with this discussion, while other commenters disagreed. Commenters who supported the expanded exemptions cited these and similar

sources suggesting that denying expanded exemptions to the Mandate is not a narrowly tailored way to advance the Government’s interests in reducing teen pregnancy, and suggesting there are means of doing so that are less restrictive of religious exercise.<sup>42</sup> Some commenters opposing the expanded exemptions stated that school-based health centers provide access to contraceptives, thus increasing use of contraceptives by sexually active students. They also cited studies concluding that certain decreases in teen pregnancy are attributable to increased contraceptive use.<sup>43</sup>

Many commenters opposing the Religious IFC misunderstood the Departments’ discussion of this issue. Teens are a significant part, though not the entirety, of women the IOM identified as being most at risk of unintended pregnancy. The Departments do not take a position on the empirical question of whether contraception has caused certain reductions in teen pregnancy. Rather, we note that studies suggesting various causes of teen pregnancy and unintended pregnancy in general support the Departments’ conclusion that it is difficult to establish causation between granting religious exemptions to the contraceptive Mandate and either an increase in teen pregnancies in particular, or unintended pregnancies in general. For

example, a 2015 study investigating the decline in teen pregnancy since 1991 attributed it to multiple factors (including but not limited to reduced sexual activity, falling welfare benefit levels, and expansion of family planning services in Medicaid, with the latter accounting for less than 13 percent of the decline), and concluded “that none of the relatively easy, policy-based explanations for the recent decline in teen childbearing in the United States hold up very well to careful empirical scrutiny.”<sup>44</sup> One study found that during the teen pregnancy decline between 2007–2012, teen sexual activity was also decreasing.<sup>45</sup> One study concluded that falling unemployment rates in the 1990s accounted for 85% of the decrease in rates of first births among 18–19 year-old African Americans.<sup>46</sup> Another study found that the representation of African-American teachers was associated with a significant reduction in the African-American teen pregnancy rate.<sup>47</sup> One study concluded that an “increase in the price of the Pill on college campuses . . . did not increase the rates of unintended pregnancy.”<sup>48</sup> Similarly, one study from England found that, where funding for teen pregnancy prevention was reduced, there was no evidence that the reduction led to an increase in teen pregnancies.<sup>49</sup> Some commenters also cited studies, which

may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. See Brief for HHS in No. 13–354, pp. 9–10, n. 4; FDA, Birth Control: Medicines to Help You.” *Hobby Lobby*, 134 S. Ct. at 2762–63. “The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. . . . Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.” *Id.* at 2765–66.

<sup>41</sup>Citing J.S. Santelli & A.J. Melnikas, “Teen fertility in transition: recent and historic trends in the United States,” 31 *Ann. Rev. Pub. Health* 371, 375–76 (2010), and Peter Arcidiacono et al., *Habit Persistence and Teen Sex: Could Increased Access to Contraception Have Unintended Consequences for Teen Pregnancies?* (2005), available at <http://public.econ.duke.edu/~psarcidi/addicted13.pdf>. See also K. Buckles & D. Hungerman, “The Incidental Fertility Effects of School Condom Distribution Programs,” *Nat’l Bureau of Econ. Research Working Paper No. 22322* (June 2016), available at <http://www.nber.org/papers/w22322> (“access to condoms in schools increases teen fertility by about 10 percent” and increased sexually transmitted infections).

<sup>42</sup>See Helen Alvaré, “No Compelling Interest: The ‘Birth Control’ Mandate and Religious Freedom,” 58 *Vill. L. Rev.* 379, 400–02 (2013) (discussing the Santelli & Melnikas study and the Arcidiacono study cited above, and other research that considers the extent to which reduction in teen pregnancy is attributable to sexual risk avoidance rather than to contraception access).

<sup>43</sup>See, for example, Lindberg L., Santelli J., “Understanding the Decline in Adolescent Fertility in the United States, 2007–2012,” 59 *J. Adolescent Health* 577–83 (Nov. 2016), <https://doi.org/10.1016/j.jadohealth.2016.06.024>; see also Comment of The Colorado Health Foundation, submission ID CMS-2014-0115-19635, [www.regulations.gov](http://www.regulations.gov) (discussing teen pregnancy data from Colorado).

<sup>44</sup>Kearney MS and Levine PB, “Investigating recent trends in the U.S. birth rate,” 41 *J. Health Econ.* 15–29 (2015), available at <https://www.sciencedirect.com/science/article/abs/pii/S0167629615000041>.

<sup>45</sup>See, for example, K. Ethier et al., “Sexual Intercourse Among High School Students—29 States and United States Overall, 2005–2015,” 66 *CDC Morb. Mortal. Wkly Report* 1393, 1393–97 (Jan. 5, 2018), available at <http://dx.doi.org/10.15585/mmwr.mm665152a1> (“Nationwide, the proportion of high school students who had ever had sexual intercourse decreased significantly overall . . .”).

<sup>46</sup>Colen CG, Geronimus AT, and Phipps MG, “Getting a piece of the pie? The economic boom of the 1990s and declining teen birth rates in the United States,” 63 *Social Science & Med.* 1531–45 (Sept. 2006), available at <https://www.sciencedirect.com/science/article/pii/S027795360600205X>.

<sup>47</sup>Atkins DN and Wilkins VM, “Going Beyond Reading, Writing, and Arithmetic: The Effects of Teacher Representation on Teen Pregnancy Rates,” 23 *J. Pub. Admin. Research & Theory* 771–90 (Oct. 1, 2013), available at <https://academic.oup.com/jpart/article-abstract/23/4/771/963674>.

<sup>48</sup>E. Collins & B. Herchbein, “The Impact of Subsidized Birth Control for College Women: Evidence from the Deficit Reduction Act,” *U. Mich. Pop. Studies Ctr. Report* 11-737 (May 2011), available at <https://www.psc.isr.umich.edu/pubs/pdf/tr11-737.pdf> (“[I]ncrease in the price of the Pill on college campuses . . . did not increase the rates of unintended pregnancy or sexually transmitted infections for most women”).

<sup>49</sup>See D. Paton & L. Wright, “The effect of spending cuts on teen pregnancy,” 54 *J. Health Econ.* 135, 135–46 (2017), available at <https://www.sciencedirect.com/science/article/abs/pii/S0167629617304551> (“Contrary to predictions made at the time of the cuts, panel data estimates provide no evidence that areas which reduced expenditure the most have experienced relative increases in teenage pregnancy rates. Rather, expenditure cuts are associated with small reductions in teen pregnancy rates”).



are not limited to the issue of teen pregnancy, that have found many women who have abortions report that they were using contraceptives when they became pregnant.<sup>50</sup>

As the Departments stated in the Religious IFC, we do not take a position on the variety of empirical questions discussed above. Likewise, these rules do not address the substantive question of whether HRSA should include contraceptives in the women's preventive services Guidelines issued under section 2713(a)(4). Rather, reexamination of the record and review of the public comments has reinforced the Departments' conclusion that significantly more uncertainty and ambiguity exists on these issues than the Departments previously acknowledged when we declined to extend the exemption to certain objecting organizations and individuals. The uncertainty surrounding these weighty and important issues makes it appropriate to maintain the expanded exemptions and accommodation if and for as long as HRSA continues to include contraceptives in the Guidelines. The federal government has a long history, particularly in certain sensitive and multifaceted health issues, of providing religious exemptions from governmental mandates. These final rules are consistent with that history and with the discretion Congress vested in the Departments for implementing the ACA.

### *G. Health and Equality Effects of Contraceptive Coverage Mandates*

The Departments also received comments about the health and equality effects of the Mandate more broadly. Some commenters contended that the contraceptive Mandate promotes the health and equality of women, especially low income women and promotes female participation and equality in the workforce. Other commenters contended that there was insufficient evidence that the expanded exemptions would harm those

interests. Some of those commenters further questioned whether there was evidence that broad health coverage mandates of contraception lead to increased contraceptive use, reductions in unintended pregnancies, or reductions in negative effects said to be associated with unintended pregnancies. In particular, some commenters discussed the study quoted above, published and revised by the Guttmacher Institute in October 2017, concluding that through 2014 there were no significant changes in the overall proportion of women who used a contraceptive method both among all women and among women at risk of unintended pregnancy, that there was no significant shift from less effective to more effective methods, and that it was "unclear" whether this Mandate impacted contraceptive use because there was no significant increase in the use of contraceptive methods the Mandate covered.<sup>51</sup> These commenters also noted that, in the 29 States where contraceptive coverage mandates have been imposed statewide,<sup>52</sup> those mandates have not necessarily lowered rates of unintended pregnancy (or abortion) overall.<sup>53</sup> Other commenters, however, disputed the significance of these state statistics, noting that of the 29 states with contraceptive coverage mandates, only four states have laws that match the federal requirements in scope. Some also observed that, even in states with state contraceptive coverage mandates, self-insured group health plans might escape those requirements, and some states do not mandate the contraceptives to be covered at no out-of-pocket cost to the beneficiary.

The Departments have considered these experiences as relevant to the effect the expanded exemptions in these rules might have on the Mandate more broadly. The state mandates apply to a very large number of plans and plan participants, notwithstanding ERISA preemption, and public commenters did not point to studies showing those state mandates reduced unintended pregnancies. The federal contra-

ceptive Mandate, likewise, applies to a broad, but not entirely comprehensive, number of employers. For example, to the extent that houses of worship and integrated auxiliaries may have self-insured to avoid state health insurance contraceptive coverage mandates or for other reasons, those groups are, and have been, exempt from the federal Mandate prior to the Religious IFC. The exemptions as set forth in the Religious IFC and in these final rules leave the contraceptive Mandate in place for nearly all entities and plans to which the Mandate has applied. The Departments are not aware of data showing that these expanded exemptions would negate any reduction in unintended pregnancies that might result from a broad contraceptive coverage mandate.

Some commenters expressed concern that providing exemptions to the Mandate that private parties provide contraception may lead to exemptions regarding other medications or services, like vaccines. The exemptions provided in these rules, however, do not apply beyond the contraceptive coverage requirement implemented through section 2713(a)(4). Specifically, PHS Act section 2713(a)(2) requires coverage of "immunizations," and these exemptions do not encompass that requirement. The fact that the Departments have exempted houses of worship and integrated auxiliaries from the contraceptive Mandate since 2011 did not lead to those entities receiving exemptions under section 2713(a)(2) concerning vaccines. In addition, hundreds of entities have sued the Departments over the implementation of section 2713(a)(4), leading to two decisions of the U.S. Supreme Court, but no similar wave of lawsuits has challenged section 2713(a)(2). The expanded exemptions in these final rules are consistent with a long history of statutes protecting religious beliefs from certain health care mandates concerning issues such as sterilization, abortion and birth control.

<sup>50</sup>Commenters cited, for example, Guttmacher Institute, "Fact Sheet: Induced Abortion in the United States" (Jan. 2018) ("Fifty-one percent of abortion patients in 2014 were using a contraceptive method in the month they became pregnant"), available at [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf).

<sup>51</sup>Kavanaugh, 97 *Contraception* at 14–21.

<sup>52</sup>See Guttmacher Institute, "Insurance Coverage of Contraceptives" (June 11, 2018); Kaiser Family Foundation, "State Requirements for Insurance Coverage of Contraceptives," Henry J Kaiser Family Foundation (Jan. 1, 2018), <https://www.kff.org/other/state-indicator/state-requirements-for-insurance-coverage-of-contraceptives/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

<sup>53</sup>See Michael J. New, "Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes," 13 *Ave Maria L. Rev.* 345 (2015), available at <http://avemarialaw-lawreview.avemarialaw.edu/Content/articles/vXIII.i2.new.final.0809.pdf>.

Some commenters took issue with the conclusion set forth in the Religious IFC, which is similar to that asserted in the 2017 Guttmacher study, that “[t]he role that the contraceptive coverage guarantee played in impacting use of contraception at the national level remains unclear, as there was no significant increase in the use of methods that would have been covered under the ACA.” They observed that more women have coverage of contraceptives and contraception counseling under the Mandate and that more contraceptives are provided without co-pays than before. Still other commenters argued that the Mandate, or other expansions of contraceptive coverage, have led women to increase their use of contraception in general, or to change from less effective, less expensive contraceptive methods to more effective, more expensive contraceptive methods. Some commenters lamented that exemptions would include exemption from the requirement to cover contraception counseling. Some commenters pointed to studies cited in the 2011 IOM Report recommending contraception be included in the Guidelines and argued that certain women will go without certain health care, or contraception specifically, because of cost. They contended that a smaller percentage of women delay or forego health care overall under the ACA<sup>54</sup> and that, according to studies, coverage of contraceptives without cost-sharing has increased use of contraceptives in certain circumstances. Some commenters also argued that studies show that decreases in unintended pregnancies are due to broader access of contraceptives. Finally, some commenters argued that birth control access generally has led to social and economic equality for women.

The Departments have reviewed the comments, including studies submitted by commenters either supporting or opposing these expanded exemptions. Based on our review, it is not clear that merely expanding exemptions as done in these rules will have a significant effect on contraceptive use and health, or workplace equality, for the vast majority of women benefitting from the Mandate. There is conflicting evidence regarding whether the Mandate alone, as distinct from birth control access

more generally, has caused increased contraceptive use, reduced unintended pregnancies, or eliminated workplace disparities, where all other women’s preventive services were covered without cost sharing. Without taking a definitive position on those evidentiary issues, however, we conclude that the Religious IFC and these final rules—which merely withdraw the Mandate’s requirement from what appears to be a small group of newly exempt entities and plans—are not likely to have negative effects on the health or equality of women nationwide. We also conclude that the expanded exemptions are an appropriate policy choice left to the agencies under the relevant statutes, and, thus, are an appropriate exercise of the Departments’ discretion.

Moreover, we conclude that the best way to balance the various policy interests at stake in the Religious IFC and these final rules is to provide the expanded exemptions set forth herein, even if certain effects may occur among the populations actually affected by the employment of these exemptions. These rules will provide tangible protections for religious liberty, and impose fewer governmental burdens on various entities and individuals, some of whom have contended for several years that denying them an exemption from the contraceptive Mandate imposes a substantial burden on their religious exercise. The Departments view the provision of those protections to preserve religious exercise in this health care context as an appropriate policy option, notwithstanding the widely divergent effects that public commenters have predicted based on different studies they cited. Providing the protections for religious exercise set forth in the Religious IFC and these final rules is not inconsistent with the ACA, and brings this Mandate into better alignment with various other federal conscience protections in health care, some of which have been in place for decades.

### **III. Description of the Text of the Regulations and Response to Additional Public Comments**

Here, the Departments describe the regulatory text set forth prior to the Reli-

gious IFC, the regulations from that IFC, public comments in response to the specific regulatory text set forth in the IFC, the Departments’ response to those comments, and, in consideration of those comments, the regulatory text as finalized in this final rule. As noted above, various members of the public provided comments that were supportive, or critical, of the Religious IFC overall, or of significant policies pertaining to those regulations. To the extent those comments apply to the following regulatory text, the Departments have responded to them above. This section of the preamble responds to comments that pertain more specifically to particular regulatory text.

*A. Restatement of Statutory Requirements of PHS Act Section 2713(a) and (a)(4) (26 CFR 54.9815–2713(a)(1) and (a)(1)(iv), 29 CFR 2590.715–2713(a)(1) and (a)(1)(iv), and 45 CFR 147.130(a)(1) and (a)(1)(iv)).*

The previous regulations restated the statutory requirements of section 2713(a) of the PHS Act, at 26 CFR 54.9815–2713(a)(1) and (a)(1)(iv), 29 CFR 2590.715–2713(a)(1) and (a)(1)(iv), and 45 CFR 147.130(a)(1) and (a)(1)(iv). The Religious IFC modified these restatements to more closely align them with the text of PHS Act section 2713(a) and (a)(4).

Previous versions of these rules had varied from the statutory language. PHS Act section 2713(a) and (a)(4) require group health plans and health insurance issuers offering coverage to provide coverage without cost sharing for “such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines” supported by HRSA. In comparison, the previous version of regulatory restatements of this language (as drawn from 45 CFR 147.130(a)(1) and (a)(1)(iv)) stated the coverage must include “evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by” HRSA. The Religious IFC amended this language to state, parallel to the language in section 2713(a)(4), that the coverage must include “such additional preventive care and screenings not described in paragraph (a)(1)(i) of this section as pro-

<sup>54</sup>Citing, for example, Adelle Simmons et al., “The Affordable Care Act: Promoting Better Health for Women,” Table 1, Assistant Secretary for Planning and Evaluation (June 14, 2016), <https://aspe.hhs.gov/system/files/pdf/205066/ACAWomenHealthIssueBrief.pdf>.

vided for in comprehensive guidelines supported by” HRSA.

These rules adopt as final, without change, the provisions in the Religious IFC amending 26 CFR 54.9815–2713(a)(1) and (a)(1)(iv), 29 CFR 2590.715–2713(a)(1) and (a)(1)(iv), and 45 CFR 147.130(a)(1) and (a)(1)(iv). In this way, the regulatory text better conforms to the statutory language. In paragraph (a)(1) of the final regulations, instead of saying “must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements . . . with respect to those items and services:”, the regulation now tracks the statutory language by saying “must provide coverage for and must not impose any cost-sharing requirements . . . for—”. By eliminating the language “coverage for all of the following items and services,” and “with respect to those items and services,” the Departments do not intend that coverage for specified items and services will not be required, but we simply intend to simplify the text of the regulation to track the statute and avoid duplicative language.

By specifying that paragraph (a)(1)(iv) concerning the women’s preventive services Guidelines encompasses “such additional preventive care and screenings not described in paragraph (a)(1)(i) of this section as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of section 2713(a)(4) of the Public Health Service Act, subject to §§ 147.131 and 147.132,” the regulatory text also better tracks the statutory language that the Guidelines are for “such additional” preventive services as HRSA may “provide[] for” and “support[.]” This text also eliminates language, not found in the statute, that the Guidelines are “evidence-informed” and “binding.” Congress did not include the word “binding” in PHS Act section 2713, and did include the words “evidence-based” or “evidence-informed” in section 2713(a)(1) and (a)(3), but omitted such terms from section 2713(a)(4). In this way, the regulatory text better comports with the scope of the statutory text. This text of paragraph (a)(1)(iv) also acknowledges that the Departments have decided Guidelines issued under section 2713(a)(4) will not be provided for or supported to the extent they exceed the ex-

emptions and accommodation set forth in 45 CFR 147.131 and 147.132. Previous versions of the regulation placed that limit in 45 CFR 147.130(a)(1), but did not reiterate it in § 147.130(a)(1)(iv). To clearly set forth the applicability of the exemptions and accommodation, the Departments adopt as final the Religious IFC language, which included the language “subject to §§ 147.131 and 147.132” in both § 147.130(a)(1) and § 147.130(a)(1)(iv). Because these final rules adopt as final the Religious IFC language which includes the exemptions and accommodation in both §§ 147.131 and 147.132, and not just in § 147.131 as under the previous rules, the Departments correspondingly included references to both sections in this part.

Some commenters supported restoring the statutory language from PHS Act section 2713(a) and (a)(4) in the regulatory restatements of that language. Other commenters opposed doing so, asserting that Guidelines issued pursuant to section 2713(a)(4) must be “evidence-informed” and “binding.” The Departments disagree with the position that, even though Congress omitted those terms from section 2713(a)(4), their regulatory restatement of the statutory requirement should include those terms. Instead, the Departments conclude that it is more appropriate for the regulatory restatements of section 2713(a)(4) to track the statutory language in this regard, namely, “as provided for in comprehensive guidelines supported by [HRSA] for purposes of” that paragraph.

#### *B. Prefatory Language of Religious Exemptions (45 CFR 147.132(a)(1))*

These final rules adopt as final, with changes based on comments as set forth below, the regulatory provision in the Religious IFC that moved the religious exemption from 45 CFR 147.131(a) to 45 CFR 147.132.

In the previous regulations, the exemption stated, at § 147.131(a), that HRSA’s Guidelines “may establish an exemption” for the health plan or coverage of a “religious employer,” defined as “an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.” The Religious IFC

moved the exemption to a new § 147.132, in which paragraph (a) discussed objecting entities, paragraph (b) discussed objecting individuals, paragraph (c) set forth a definition, and paragraph (d) discussed severability. The prefatory language to § 147.132(a)(1) stated that HRSA’s Guidelines “must not provide for or support the requirement of coverage or payments for contraceptive services” for the health plan or coverage of an “objecting organization,” and thus that HRSA “will exempt” such an organization from the contraceptive coverage requirements of the Guidelines. The remainder of paragraph (a)(1), which is discussed in greater detail below, describes what entities are included as objecting organizations.

This language not only specifies that certain entities are “exempt,” but also explains that the Guidelines shall not support or provide for an imposition of the contraceptive coverage requirement to such exempt entities. This is an acknowledgement that section 2713(a)(4) requires women’s preventive services coverage only “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration.” To the extent the HRSA Guidelines do not provide for, or support, the application of such coverage to certain entities or plans, the Affordable Care Act does not require the coverage. Those entities or plans are “exempt” by not being subject to the requirements in the first instance. Therefore, in describing the entities or plans as “exempt,” and in referring to the “exemption” encompassing those entities or plans, the Departments also affirm the non-applicability of the Guidelines to them.

The Departments wish to make clear that the expanded exemption set forth in § 147.132(a) applies to several distinct entities involved in the provision of coverage to the objecting employer’s employees. This explanation is consistent with how prior regulations have worked by means of similar language. When sections § 147.132(a)(1) and (a)(1)(i) specify that “[a] group health plan,” “health insurance coverage provided in connection with a group health plan,” and “health insurance coverage offered or arranged by an objecting organization” are exempt “to the extent” of the objections “as specified in



paragraph (a)(2),” that language exempts the group health plans of the sponsors that object, and their health insurance issuers in providing the coverage in those plans (whether or not the issuers have their own objections). Consequently, with respect to Guidelines issued under § 147.130(a)(1)(iv) (and as referenced by the parallel provisions in 26 CFR 54.9815–2713(a)(1)(iv) and 29 CFR 2590.715–2713(a)(1)(iv)), the plan sponsor, issuer, and plan covered in the exemption of § 147.132(a)(1) and (a)(1)(i) would face no penalty as a result of omitting certain contraceptive coverage from the benefits of the plan participants and beneficiaries. However, while the objection of a plan sponsor (or entity that arranges coverage under the plan, as applicable) removes penalties from that plan’s issuer, it only does so for that plan—it does not affect the issuer’s coverage for other group health plans where the plan sponsor has no qualifying objection. More information on the effects of the objection of a health insurance issuer in § 147.132(a)(1)(iii) is included below.

The exemptions in § 147.132(a)(1) apply “to the extent” of the objecting entities’ sincerely held religious convictions. Thus, entities that hold a requisite objection to covering some, but not all, contraceptive items would be exempt with respect to the items to which they object, but not with respect to the items to which they do not object. Some commenters said it was unclear whether the plans of entities or individuals that religiously object to some but not all contraceptives would be exempt from being required to cover just the contraceptive methods as to which there is an objection, or whether the objection to some contraceptives leads to an exemption from that plan being required to cover all contraceptives. The Departments intend that a requisite religious objection against some but not all contraceptives would lead to an exemption only to the extent of that objection: that is, the exemption would encompass only the items to which the relevant entity or individual objects, and would not encompass contraceptive methods to which the objection does not apply. To make this clearer, in these final rules,

the Departments finalize the prefatory language of § 147.132(a) with the following change, so that the final rules state that an exemption shall be included, and the Guidelines must not provide for contraceptive coverage, “to the extent of the objections specified below.”

The Departments have made corresponding changes to language throughout the regulatory text, to describe the exemptions as applying “to the extent” of the objection(s).

### *C. Scope of Religious Exemptions and Requirements for Exempt Entities (45 CFR 147.132)*

In 45 CFR 147.132(a)(1)(i) through (iii) and (b), the Religious IFC expands the exemption to plans of additional entities and individuals not encompassed by the exemption set forth in the regulations prior to the Religious IFC. Specific entities to which the expanded exemptions apply are discussed below.

The exemptions contained in previous regulations, at § 147.131(a), did not require exempt entities to submit any particular self-certification or notice, either to the government or to their issuer or third party administrator, in order to obtain or qualify for the exemption. Similarly, under the expanded exemptions in § 147.132, the Religious IFC did not require exempt entities to comply with a self-certification process. We finalize that approach in this respect without change. Although exempt entities do not need to file notices or certifications of their exemption, and these final rules do not impose any new notice requirements on them, existing ERISA rules governing group health plans require that, with respect to plans subject to ERISA, a plan document must include a comprehensive summary of the benefits covered by the plan and a statement of the conditions for eligibility to receive benefits. Under ERISA, the plan document identifies what benefits are provided to participants and beneficiaries under the plan; if an objecting employer would like to exclude all or a subset of contraceptive services, it must ensure that the exclusion is clear in the plan document.

Moreover, if there is a reduction in a covered service or benefit, the plan has to disclose that change to plan participants.<sup>55</sup> Thus, where an exemption applies and all (or a subset of) contraceptive services are omitted from a plan’s coverage, otherwise applicable ERISA disclosure documents must reflect the omission of coverage in ERISA plans. These existing disclosure requirements serve to help provide notice to participants and beneficiaries of what ERISA plans do and do not cover.

Some commenters supported the expanded exemption’s approach which maintained the policy of the previous exemption in not requiring exempt entities to comply with a self-certification process. They suggested that self-certification forms for an exemption are not necessary, could add burdens to exempt entities beyond those imposed by the previous exemption, and could give rise to religious objections to the self-certification process itself. Commenters also stated that requiring an exemption form for exempt entities could cause additional operational burdens for plans that have existing processes in place to handle exemptions. Other commenters, however, favored including a self-certification process for exempt entities. They suggested that entities might abuse the availability of an exemption or use exempt status insincerely if no self-certification process exists, and that the Mandate might be difficult to enforce without a self-certification process. Some commenters asked that the government publish a list of entities that claim the exemption.

The Departments believe it is appropriate to not require exempt entities to submit a self-certification or notice. The previous exemption did not require a self-certification or notice, and the Departments did not collect a list of all entities that used the exemption. The Departments believe the approach under the previous exemption is appropriate for the expanded exemption. Adding a self-certification or notice to the exemption process would impose an additional paperwork burden on exempt entities that the previous regulations did not impose, and would also involve additional public costs if those certifications or notices were to be reviewed or kept on file by the government.

<sup>55</sup>See, for example, 29 U.S.C. 1022, 1024(b), 29 CFR 2520.102-2, 102-3, & 104b-3(d), and 29 CFR 2590.715-2715. See also 45 CFR 147.200 (requiring disclosure of the “exceptions, reductions, and limitations of the coverage,” including group health plans and group and individual issuers).



The Departments are not aware of instances where the lack of a self-certification under the previous exemption led to abuses or to an inability to engage in enforcement. The Mandate is enforceable through various mechanisms in the PHS Act, the Code, and ERISA. Entities that insincerely or otherwise improperly operate as if they are exempt would do so at the risk of enforcement under such mechanisms. The Departments are not aware of sufficient reasons to believe those measures and mechanisms would fail to deter entities from improperly operating as if they are exempt. Moreover, as noted above, ERISA and other plan disclosure requirements governing group health plans require provision of a comprehensive summary of the benefits covered by the plan and disclosure of any reductions in covered services or benefits, so beneficiaries in plans that reduce or eliminate contraceptive benefits as a result of the exemption will know whether their health plan claims an exemption and will be able to raise appropriate challenges to such claims. As a consequence, the Departments believe it is an appropriate balance of various concerns expressed by commenters for these rules to continue to not require notices or self-certifications for using the exemption.

Some commenters asked the Departments to add language indicating that an exemption cannot be invoked in the middle of a plan year, nor should it be used to the extent inconsistent with laws that apply to, or state approval of, fully insured plans. None of the previous iterations of the exemption regulations included such provisions, and the Departments do not consider them necessary in these rules. The expanded exemptions in these rules only purport to exempt plans and entities from the application of the federal contraceptive coverage requirement of the Guidelines issued under section 2713(a)(4). They do not purport to exempt entities or plans from state laws concerning contraceptive coverage, or laws governing whether an entity can make a change (of whatever kind) during a plan year. The rules governing the accommodation likewise do not purport to obviate the need to follow otherwise applicable rules about making changes during a

plan year. (Below, these rules discuss in more detail the accommodation and when an entity seeking to revoke it would be able to do so or to notify plan participants of the revocation.)

Commenters also asked that clauses be added to the regulatory text holding issuers harmless where exemptions are invoked by plan sponsors. As discussed above, the exemption rules already specify that, where an exemption applies to a group health plan, it encompasses both the group health plan and health insurance coverage provided in connection with the group health plan, and therefore encompasses any impact on the issuer of the contraceptive coverage requirement with respect to that plan. In addition, as discussed below, the Departments are including, in these final rules, language from the previous regulations protecting issuers that act in reliance on certain representations made in the accommodation process. To the extent that commenters seek language offering additional protections for other incidents that might occur in connection with the invocation of an exemption, the previous exemption regulations did not include such provisions, and the Departments do not consider them necessary in these final rules. As noted above, the expanded exemptions in these final rules simply remove or narrow the contraceptive Mandate contained in and derived from the Guidelines for certain plans. The previous regulations included a reliance clause in the accommodation provisions, but did not specify further details regarding the relationship between exempt entities and their issuers or third party administrators.

Regarding the Religious IFC's expansion of the exemption to other kinds of entities and individuals in general, commenters disagreed about the likely effects of the exemptions on the health coverage market. Some commenters said that expanding the exemptions would not cause complications in the market, while others said that it could, due to such causes as a lack of uniformity among plans or permitting multiple risk pools. The Departments note that the extent to which plans cover

contraception under the prior regulations is already far from uniform. Congress did not require all entities to comply with section 2713 of the PHS Act (under which the Mandate was promulgated)—most notably by exempting grandfathered plans. Moreover, under the previous regulations, issuers were already able to offer plans that omit contraceptives—or offer only some contraceptives—to houses of worship and integrated auxiliaries; some commenters and litigants said that issuers were doing so. These cases where plans did not need to comply with the Mandate, and the Departments' previous accommodation process allowing coverage not to be provided in certain self-insured church plans, together show that the importance of a uniform health coverage system is not significantly harmed by allowing plans to omit contraception in some contexts.<sup>56</sup>

Concerning the prospect raised by commenters of different risk pools between men and women, PHS Act section 2713(a) itself provides for some preventive services coverage that applies to both men and women, and some that would apply only to women. With respect to the latter, it does not specify what, if anything, HRSA's Guidelines for women's preventives services would cover, or if contraceptive coverage would be required. These rules do not require issuers to offer products that satisfy religiously objecting entities or individuals; they simply make it legal to do so. The Mandate has been imposed only relatively recently, and the contours of its application to religious entities has been in continual flux, due to various rulemakings and court orders. Overall, concerns raised by some public commenters have not led the Departments to consider it likely that offering these expanded exemptions will cause any injury to the uniformity or operability of the health coverage market.

#### *D. Plan Sponsors in General (45 CFR 147.132(a)(1)(i) prefatory text)*

With respect to employers and others that sponsor group health plans, in § 147.132(a)(1)(i), the Religious IFC pro-

<sup>56</sup>See also *Real Alternatives v. Sec'y, Dep't of Health & Human Servs.*, 867 F.3d 338, 389 (3d Cir. 2017) (Jordan, J., concurring in part and dissenting in part) ("Because insurance companies would offer such plans as a result of market forces, doing so would not undermine the government's interest in a sustainable and functioning market. . . . Because the government has failed to demonstrate why allowing such a system (not unlike the one that allowed wider choice before the ACA) would be unworkable, it has not satisfied strict scrutiny." (citation and internal quotation marks omitted)).

vided exemptions for non-governmental plan sponsors that object to coverage of all, or a subset of, contraceptives or sterilization and related patient education and counseling based on sincerely held religious beliefs. The Departments finalize the prefatory text of § 147.132(a)(1)(i) without change.

The expanded exemptions covered any kind of non-governmental employer plan sponsor with the requisite objections, stating the exemption encompassed “[a] group health plan and health insurance coverage provided in connection with a group health plan to the extent the non-governmental plan sponsor objects as specified in paragraph (a)(2) of this section.” For the sake of clarity, the expanded exemptions also stated that “[s]uch non-governmental plan sponsors include, but are not limited to, the following entities,” followed by an illustrative, non-exhaustive list of non-governmental organizations whose objections qualify the plans they sponsor for an exemption. Each type of such entities, and comments specifically concerning them, are discussed below.

The plans of governmental employers are not covered by the plan sponsor exemption in § 147.132(a)(1)(i). Some commenters suggested that the expanded religious exemptions should include government entities. Others disagreed. The Departments are not aware of reasons why it would be appropriate or necessary to offer a religious exemption to governmental employer plan sponsors with respect to the contraceptive Mandate. We are unaware of government entities that would attempt to assert a religious exemption to the Mandate, and it is not clear to us that a governmental entity could do so. Accordingly, we conclude that it is appropriate for us to not further expand the religious exemption to include governmental entities in the religious plan-sponsor exemption.

Nevertheless, as discussed below, governmental employers are permitted to respect an individual’s objection under § 147.132(b) and, thus, to provide health coverage without the objected-to contraceptive coverage to such individual. Where that exemption is operative, the Guidelines may not be construed to prevent a willing governmental plan sponsor of a group health

plan from offering a separate benefit package option, or a separate policy, certificate or contract of insurance, to any individual who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs.

By the general extension of the exemption to the plans of plan sponsors in § 147.132(a)(1)(i), these final rules also exempt group health plans sponsored by an entity other than an employer (for example, a union, or a sponsor of a multiemployer plan) that objects based on sincerely held religious beliefs to coverage of contraceptives or sterilization. Some commenters objected to extending the exemption to such entities, arguing that they could not have the same kind of religious objection that a single employer might have. Other commenters supported the protection of any plan sponsor with the requisite religious objection. The Departments conclude that it is appropriate, where the plan sponsor of a union, multiemployer, or similar plan adopts a religious objection using the same procedures that such a plan sponsor might use to make other decisions, that the expanded exemptions should respect that decision by providing an exemption from the Mandate.

#### *E. Houses of Worship and Integrated Auxiliaries (45 CFR 147.132(a)(1)(i)(A))*

As noted above, the exemption in the previous regulations, found at § 147.131(a), included only “an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.” Section 6033(a)(3)(A)(i) or (iii) of the Code encompasses “churches, their integrated auxiliaries, and conventions or associations of churches,” and “the exclusively religious activities of any religious order.”

The Religious IFC expanded the exemption to include, in § 147.132(a)(1)(i)(A), plans sponsored by “[a] church, an integrated auxiliary of a church, a convention or association of churches, or a religious order.” Most commenters did not oppose the exemptions continuing to include these entities, although some contended that the Departments have no authority to exempt any entity or plan from the Mandate, an objec-

tion to which the Departments respond above. Notably, this exemption exempts “a religious order,” and not merely “the exclusively religious activities of any religious order.” In addition, section 6033(a)(3)(A)(i) specifies that it covers churches, not merely “the exclusively religious activities” of a church. Some religious people might express their beliefs through a church, others might do so through a religious order, and still others might do so through religious bodies that take a different form, structure, or nomenclature based on a different cultural or historical tradition. *Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 198 (2012) (Alito and Kagan, JJ., concurring) (“The term ‘minister’ is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists.”). For the purposes of respecting the exercise of religious beliefs, which the expanded exemptions in these rules concern, the Departments find it appropriate that this part of the exemption encompasses religious orders and churches similarly, without limiting the scope of the protection to the exclusively religious activities of either kind of entity. Based on all these considerations, the Departments finalize § 147.132(a)(1)(i)(A) without change.

Moreover, the Departments also finalize the regulatory text to exempt plans “established or maintained by” a house of worship or integrated auxiliary on a plan, not employer, basis. Under previous regulations, the Departments stated that “the availability of the exemption or accommodation [was to] be determined on *an employer by employer basis*, which the Departments . . . believe[d] best balance[d] the interests of religious employers and eligible organizations and those of employees and their dependents.” (78 FR 39886 (emphasis added)). Therefore, under the prior exemption, if an employer participated in a house of worship’s plan—perhaps because it was affiliated with a house of worship—but was not an integrated auxiliary or a house of worship itself, that employer was not covered by the exemption, even though it was, in the ordinary meaning of the text of the prior regulation, participating in a “plan established or maintained by a [house of wor-

ship].” Upon further consideration, in the Religious IFC, the Departments changed their view on this issue and expanded the exemption for houses of worship and integrated auxiliaries. Under these rules, the Departments intend that, when this regulation text exempts a plan “established or maintained by” a house of worship or integrated auxiliary, such exemption will no longer “be determined on an employer by employer basis,” but will be determined on a plan basis—that is, by whether the plan is a “plan established or maintained by” a house of worship or integrated auxiliary. This interpretation better conforms to the text of the regulation setting forth the exemption—in both the prior regulation and in the text set forth in these final rules. It also offers appropriate respect to houses of worship and their integrated auxiliaries not only in their internal employment practices, but in their choice of organizational form and/or in their activity of establishing or maintaining health plans for employees of associated employers that do not meet the requirement of being integrated auxiliaries. Under this interpretation, houses of worship would not be faced with the potential of having to include, in the plans that they have established and maintained, coverage for services to which they have a religious objection for employees of an affiliated employer participating in the plans.

The Departments do not believe there is a sufficient factual basis to exclude from this part of the exemption entities that are so closely associated with a house of worship or integrated auxiliary that they are permitted to participate in its health plan but are not themselves integrated auxiliaries. Additionally, this interpretation is not inconsistent with the operation of the accommodation under the prior regulation where with respect to self-insured church plans, hundreds of nonprofit religious entities participating in those plans were provided a mechanism by which their plan participants would not receive contraceptive coverage through the plan or third party administrator.<sup>57</sup>

Therefore, the Departments believe it is most appropriate to use a plan basis, not an employer by employer basis, to deter-

mine the scope of an exemption for a group health plan established or maintained by a house of worship or integrated auxiliary.

#### *F. Nonprofit Organizations (45 CFR 147.132(a)(1)(i)(B))*

The exemption under previous regulations did not encompass nonprofit religious organizations beyond one that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Code. The Religious IFC expanded the exemption to include plans sponsored by any other “nonprofit organization,” § 147.132(a)(1)(i)(B), if it has the requisite religious objection under § 147.132(a)(2) (see § 147.132(a)(1)(i) introductory text). The Religious IFC also specified in § 147.132(a)(1)(i)(A), as under the prior exemption, that the exemption covers “a group health plan established or maintained by . . . [a] church, the integrated auxiliary of a church, a convention or association of churches, or a religious order.” (Hereinafter “houses of worship and integrated auxiliaries.”) These rules finalize, without change, the text of § 147.132(a)(1)(i)(A) and (B).

The Departments received comments in support of, and in opposition to, this expansion. Some commenters supported the expansion of the exemptions beyond houses of worship and integrated auxiliaries to other nonprofit organizations with religious objections (referred to herein as “religious nonprofit” organizations, groups or employers). They said that religious belief and exercise in American law has not been limited to worship, that religious people engage in service and social engagement as part of their religious exercise, and, therefore, that the Departments should respect the religiosity of nonprofit groups even when they are not houses of worship and integrated auxiliaries. Some public commenters and litigants have indicated that various religious nonprofit groups possess deep religious commitments even if they are not houses of worship or their integrated auxiliaries. Other commenters did not support the expansion of exemptions to nonprofit organizations. Some of them de-

scribed churches as having a special status that should not be extended to religious nonprofit groups. Some others contended that women at nonprofit religious organizations may support or wish to use contraceptives and that if the exemptions are expanded, it would deprive all or most of the employees of various religious nonprofit organizations of contraceptive coverage.

After evaluating the comments, the Departments continue to believe that an expanded exemption is the appropriate administrative response to the substantial burdens on sincere religious beliefs imposed by the contraceptive Mandate, as well as to the litigation objecting to the same. We agree with the comments that religious exercise in this country has long been understood to encompass actions outside of houses of worship and their integrated auxiliaries. The Departments’ previous assertion that the exemptions were intended to respect a certain sphere of church autonomy (80 FR 41325) is not, in itself, grounds to refuse to extend the exemptions to other nonprofit entities with religious objections. Respect for churches does not preclude respect for other religious entities. Among religious nonprofit organizations, the Departments no longer adhere to our previous assertion that “[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection.” (78 FR 39874.) It is not clear to the Departments that the percentage of women who work at churches that oppose contraception, but who support contraception, is lower than the percentage of woman who work at nonprofit religious organizations that oppose contraception on religious grounds, but who support contraception. In addition, public comments and litigation reflect that many nonprofit religious organizations publicly describe their religiosity. Government records and those groups’ websites also often reflect those groups’ religious character. If a person who desires contraceptive coverage works at a nonprofit religious organization, the Departments believe it is sufficiently likely that the person would know, or would know to ask, whether the

<sup>57</sup>See supra at IIA.3.



organization offers such coverage. The Departments are not aware of federal laws that would require a nonprofit religious organization that opposes contraceptive coverage to hire a person who the organization knows disagrees with the organization's view on contraceptive coverage. Instead, nonprofit organizations generally have access to a First Amendment right of expressive association and religious free exercise to choose to hire persons (or, in the case of students, to admit them) based on whether they share, or at least will be respectful of, their beliefs.<sup>58</sup>

In addition, it is not at all clear to the Departments that expanding the exemptions would, as some commenters asserted, remove contraceptive coverage from employees of many large religious nonprofit organizations. Many large religious nonprofit employers, including but not limited to some Catholic hospitals, notified the Department under the last Administration that they had opted into the accommodation and expressed no objections to doing so. We also received public comments from organizations of similar nonprofit employers indicating that the accommodation satisfied their religious objections. These final rules leave the accommodation in place as an optional process. Thus, it is not clear to the Departments that all or most of such large nonprofit employers will choose to use the expanded exemption instead of the accommodation. If they continue to use the accommodation, their insurers or third party administrators would continue to be required to provide contraceptive coverage to the plan sponsors' employees through such accommodation.

Given the sincerely held religious beliefs of many nonprofit religious organizations, some commenters also contended that continuing to impose the contraceptive Mandate on certain nonprofit religious objectors might also undermine the Government's broader interests in ensuring health coverage by causing some entities to stop providing health coverage entirely.<sup>59</sup> Although the Departments do

not know the extent to which that effect would result from not extending exemptions, we wish to avoid that potential obstacle to the general expansion of health coverage.

#### *G. Closely Held For-Profit Entities (45 CFR 147.132(a)(1)(i)(C))*

The previous regulations did not exempt plans sponsored by closely held for-profit entities; however, the Religious IFC included in its list of exempt plan sponsors, at § 147.132(a)(1)(i)(C), "[a] closely held for-profit entity." These rules finalize § 147.132(a)(1)(i)(C) without change.

Some commenters supported including these entities in the exemption, saying owners of such entities exercise their religious beliefs through their businesses and should not be burdened by a federal governmental contraceptive Mandate. Other commenters opposed extending the exemption to closely held for-profit entities, saying the entities cannot exercise religion or should not have their religious opposition to contraceptive coverage protected by the exemption. Some said the entities should not be able to impose their beliefs about contraceptive coverage on their employees, and that doing so constitutes discrimination.

As set forth in the Religious IFC, the Departments believe it is appropriate to expand the exemptions to include closely held for-profit employers in order to protect the religious exercise of those entities and their owners. The ACA did not apply the preventive services mandate to the many grandfathered health plans among closely held as well as publicly traded for-profit entities, encompassing tens of millions of women. As explained below, we are not aware of evidence showing that the expanded exemptions finalized here will impact such a large number of women. And, in the Departments' view, the decision by Congress to not apply the preventive services mandate to grandfathered plans did not constitute improper discrimination or an imposition of beliefs.

We also do not believe RFRA or the large number of other statutory exemptions Congress has provided for religious beliefs (including those exercised for profit) in certain health contexts such as sterilization, contraception, or abortion have been improper.

Including closely held for-profit entities in the exemption is also consistent with the Supreme Court's ruling in *Hobby Lobby*, which declared that a corporate entity is capable of possessing and pursuing non-pecuniary goals (in *Hobby Lobby*, the pursuit of religious beliefs), regardless of whether the entity operates as a nonprofit organization, and rejected the previous Administration's argument to the contrary. 134 S. Ct. at 2768–75. Some reports and industry experts have indicated that few for-profit entities beyond those that had originally challenged the Mandate have sought relief from it after *Hobby Lobby*.<sup>60</sup>

#### *H. For-Profit Entities That Are Not Closely Held (45 CFR 147.132(a)(1)(i)(D))*

The previous regulations did not exempt for-profit entities that are not closely held. However, the Religious IFC included in its list of exempt plan sponsors, at § 147.132(a)(1)(i)(D), "[a] for-profit entity that is not closely held." These rules finalize § 147.132(a)(1)(i)(D) without change.

Under § 147.132(a)(1)(i)(D), the rules extend the exemption to the plans of for-profit entities that are not closely held. Some commenters supported including such entities, including publicly traded businesses, in the scope of the exemption. Some of them said that publicly traded entities have historically taken various positions on important public concerns beyond merely (and exclusively) seeking the company's own profits, and that nothing in principle would preclude them from using the same mechanisms of corporate decision-making to exercise religious views against contraceptive coverage. They also said that

<sup>58</sup>Notably, "the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'" *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

<sup>59</sup>See, e.g., Manya Brachear Pashman, "Wheaton College ends coverage amid fight against birth control mandate," *Chicago Tribune*, July 29, 2015; Laura Bassett, "Franciscan University Drops Entire Student Health Insurance Plan Over Birth Control Mandate," *HuffPost*, May 15, 2012.

<sup>60</sup>See Jennifer Haberkorn, "Two years later, few Hobby Lobby copycats emerge," *Politico* (Oct. 11, 2016), <http://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627>.



other protections for religious beliefs in federal health care conscience statutes do not preclude the application of such protections to certain entities on the basis that they are not closely held, and federal law defines “persons,” protected under RFRA, to include corporations at 1 U.S.C. 1. Other commenters opposed including publicly traded companies in the expanded exemptions. Some of these commenters stated that such companies could not exercise religious beliefs, and opposed the effects on women if they could. These commenters also objected that including such employers, along with closely held businesses, would extend the exemptions to all or virtually all employers.

The Departments conclude it is appropriate to include entities that are not closely held within the expanded exemptions for entities with religious objection. RFRA prohibits the federal government from “substantially burden[ing] a person’s exercise of religion . . .” unless it demonstrates that the application of the burden to the person” is the least restrictive means to achieve a compelling governmental interest. 42 U.S.C. 2000bb–1(a) & (b). As commenters noted, the definition of “person” applicable in RFRA is found at 1 U.S.C. 1, which defines “person” as including “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Accordingly, the Departments’ decision to extend the religious exemption to publicly traded for profit corporations is supported by the text of RFRA. The mechanisms for determining whether a company has adopted and holds certain principles or views, such as sincerely held religious beliefs, is a matter of well-established State law with respect to corporate decision-making,<sup>61</sup> and the Departments expect that application of such laws would cabin the scope of this exemption.

As to the impact of so extending the religious exemption, the Departments are not aware of any publicly traded entities that have publicly objected to providing contraceptive coverage on the basis of re-

ligious belief. As noted above, before the ACA, a substantial majority of employers covered contraceptives. Some commenters opposed to including publicly traded entities in these exemptions noted that there did not appear to be any known religiously motivated objections to the Mandate from publicly traded for-profit corporations. These comments support our estimates that including publicly traded entities in the exemptions will have little, if any effect, on contraceptive coverage for women. We likewise agree with the Supreme Court’s statement in *Hobby Lobby* that it is unlikely that many publicly traded companies will adopt religious objections to offering women contraceptive coverage. *See* 134 S. Ct. at 2774. Some commenters contended that, because many closely held for-profit businesses expressed religious objections to the Mandate, or took advantage of the accommodation, it is likely that many publicly traded businesses will do so. The Departments agree it is possible that publicly traded businesses may use the expanded exemption. But while scores of closely held for-profit businesses filed suit against the Mandate, no publicly traded entities did so, even though they were not authorized to seek the accommodation. Based on these data points, we believe the impact of the extension of the exemption to publicly traded for-profit organizations will not be significant. Below, based on limited data, but on years of receiving public comments and defending litigation brought by organizations challenging the Mandate on the basis of their religious objections, our best estimate of the anticipated effects of these rules is that no publicly traded employers will invoke the religious exemption.

In the Departments’ view, such estimate does not lead to the conclusion that the religious exemption should not be extended to publicly traded corporations. The Departments are generally aware that, in a country as large as the U.S., comprised of a supermajority of religious persons,<sup>62</sup> some publicly traded entities might claim a religious character for their com-

pany, or the majority of shares (or voting shares) of some publicly traded companies might be controlled by a small group of religiously devout persons so as to set forth such a religious character.<sup>63</sup> Thus we consider it possible that a publicly traded company might have religious objections to contraceptive coverage. Moreover, as noted, there are many closely held for-profit corporations that do have religious objections to covering some or all contraceptives. The Departments do not want to preclude such a closely held corporation from having to decide between relinquishing the exemption or financing future growth by sales of stock, which would be the effect of denying it the exemption if it changes its status and became a publicly traded entity. The Departments also find it relevant that other federal conscience statutes, such as those applying to hospitals or insurance companies, do not exclude publicly traded businesses from protection.<sup>64</sup> As a result, the Departments continue to consider it appropriate not to exclude such entities from these expanded exemptions.

#### *1. Other Non-Governmental Employers (45 CFR 147.132(a)(1)(i)(E))*

As noted above, the exemption in the previous regulations, found at § 147.131(a), included only churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. The Religious IFC included, in its list of exempt plan sponsors at § 147.132(a)(1)(i)(E), “[a]ny other non-governmental employer.” These rules finalize § 147.132(a)(1)(i)(E) without change.

Some commenters objected to extending the exemption to other nongovernmental employers, asserting that it is not clear such employers should be protected, nor that they can assert religious objections. The Departments, however, agree with other commenters that supported that provision of the Religious IFC. The Departments believe it is appropriate that any nongovernmental employer asserting the

<sup>61</sup>Although the Departments do not prescribe any form or notification, they would expect that such principles or views would have been adopted and documented in accordance with the laws of the jurisdiction under which the organization is incorporated or organized.

<sup>62</sup>For example, in 2017, 74 percent of Americans said that religion is fairly important or very important in their lives, and 87 percent of Americans said they believe in God. Gallup, “Religion,” available at <https://news.gallup.com/poll/1690/religion.aspx>.

<sup>63</sup>*See, for example*, Kapitall, “4 Publicly Traded Religious Companies if You’re Looking to Invest in Faith”(Feb. 7, 2014), <http://www.nasdaq.com/article/4-publicly-traded-religious-companies-if-youre-looking-to-invest-in-faith-cm324665>.

<sup>64</sup>*See, for example*, 42 U.S.C. 300a-7, 42 U.S.C. 238n, Consolidated Appropriations Act of 2018, Div. H, Sec. 507(d), Pub. L. No. 115-141, and *id.* at Div. E, Sec. 808.

requisite religious objections should be protected from the Mandate in the same way as other plan sponsors. Such other employers could include, for example, association health plans.<sup>65</sup> The reasons discussed above for providing the exemption to various specific kinds of employers, and for their ability to assert sincerely held religious beliefs using ordinary mechanisms of corporate decision-making, generally apply to other nongovernmental employers as well, if they have sincerely held religious beliefs opposed to contraceptive coverage and otherwise meet the requirements of these rules. We agree with commenters who contend there is not a sufficient basis to exclude other nongovernmental employers from the exemption.

*J. Plans established or maintained by objecting nonprofit entities (45 CFR 147.132(a)(1)(ii))*

Based on the expressed intent in the Religious IFC, as discussed above, to expand the exemption to encompass plans established or maintained by nonprofit organizations with religious objections, and on public comments received concerning those exemptions, these rules finalize new language in § 147.132(a)(1)(ii) to better clarify the scope and application of the exemptions.

The preamble to the Religious IFC contained several discussions about the Departments' intent to exempt plans established or maintained by certain religious organizations that have the requisite objection to contraceptive coverage, including instances in which the plans encompass multiple employers. For example, as noted above, the Departments intended that the exemption for houses of worship and integrated auxiliaries be interpreted to apply on a plan basis, instead of on an employer-by-employer basis. In addition, the Departments discussed at length the fact that, under the prior regulations, where an entity was enrolled in a self-insured church plan exempt from ERISA under ERISA section 3(33) and the accommodation in the previous regulations was used, that accommodation process provided no mechanism to impose, or enforce, the accommodation re-

quirement of contraceptive coverage against a third party administrator of such a plan. As a result, the prior accommodation served, in effect, as an exemption from requirements of contraceptive coverage for all organizations and employers covered under a self-insured church plan.

In response to these discussions in the Religious IFC, some commenters, including some church plans, supported the apparent intent to exempt such plans on a plan basis, but suggested that additional clarification is needed in the text of the rule to effect this intent. They observed that some plans are established or maintained by religious nonprofit entities that might not be houses of worship or integrated auxiliaries, and that some employers that adopt or participate in such plans may not be the "plan sponsors." They recommended, therefore, that the final rules specify that the exemption applies on a plan basis when plans are established or maintained by houses of worship, integrated auxiliaries, or religious nonprofits, so as to shield employers that adopt such plans from penalties for noncompliance with the Mandate.

The text of the prefatory language of § 147.132(a)(1), as set forth in the Religious IFC, declared that the Guidelines would not apply "with respect to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization." We intended this language to exempt a plan and/or coverage where the entity that established or maintained a plan was an objecting organization, and not just to look at the views or status of individual employers (or other entities) participating in such plan. The Departments agree with commenters who stated that additional clarity is needed and appropriate in these final rules, in order to ensure that such plans are exempt on a plan basis, and that employers joining or adopting those plans are exempt by virtue of the plan itself being exempt. Doing so will make the application of the expanded exemption clearer, and protect employers (and other entities) participating in such plans from penalties for noncompliance with the Mandate. Clearer language will better realize the intent to exempt plans

and coverage "established or maintained by an objecting organization," and make the operation of that exemption simpler by specifying that the exemption applies based on the objection of the entity that established or maintains the plan. Such language would also resolve the anomaly that, under the previous rules, only self-insured church plans (not insured church plans) under ERISA section 3(33) were, in effect, exempt—but only indirectly through the Departments' inability to impose, or enforce, the accommodation process against the third party administrators of such plans, instead of being specifically exempt in the rules.

We believe entities participating in plans established or maintained by an objecting organization usually share the views of those organizations. Multiple lawsuits were filed against the Departments by churches that established or maintained plans, or the church plans themselves, and they generally declared that the entities or individuals participating in their plans are usually required to share their religious affiliation or beliefs. In addition, because, as we have stated before, "providing payments for contraceptive services is cost neutral for issuers" (78 FR 39877), we do not believe this clarification would produce any financial incentive for entities that do not have religious objections to contraceptive coverage to enter into plans established or maintained by an organization that does have such objections.

Therefore, the Departments finalize the text of § 147.132(a)(1) of the Religious IFC with the following change: adding a provision that makes explicit this understanding, in a new paragraph at § 147.132(a)(1)(ii). This language now specifies that the exemptions encompassed by § 147.132(a)(1) include: "[a] group health plan, and health insurance coverage provided in connection with a group health plan, where the plan or coverage is established or maintained by a church, an integrated auxiliary of a church, a convention or association of churches, a religious order, a nonprofit organization, or other organization or association, to the extent the plan sponsor responsible for establishing and/or

<sup>65</sup>See 29 CFR 2510.3-5.

maintaining the plan objects as specified in paragraph (a)(2) of this section. The exemption in this paragraph applies to each employer, organization, or plan sponsor that adopts the plan[.]”

*K. Institutions of Higher Education (45 CFR 147.132(a)(1)(iii))*

The previous regulations did not exempt student health plans arranged by institutions of higher education, although it did, for purposes of the accommodation, treat plans arranged by institutions of higher education similar to the way in which the regulations treated plans of nonprofit religious employers. See 80 FR at 41347. The Religious IFC included in its list of exemptions, at § 147.132(a)(1)(ii), “[a]n institution of higher education as defined in 20 U.S.C. 1002 in its arrangement of student health insurance coverage, to the extent that institution objects as specified in paragraph (a)(2) of this section. In the case of student health insurance coverage, this section is applicable in a manner comparable to its applicability to group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer, and references to ‘plan participants and beneficiaries’ will be interpreted as references to student enrollees and their covered dependents.” These rules finalize this language with a change to clarify their application, as discussed below, and by redesignating the paragraph as § 147.132(a)(1)(iii).

These rules treat the plans of institutions of higher education that arrange student health insurance coverage similarly to the way in which the rules treat the plans of employers. These rules do so by making such student health plans eligible for the expanded exemptions, and by permitting them the option of electing to utilize the accommodation process. Thus, these rules specify, in § 147.132(a)(1)(iii), that the exemption is extended, in the case of institutions of higher education (as defined in 20 U.S.C. 1002) with objections to the Mandate based on sincerely held religious beliefs, to their arrangement of

student health insurance coverage in a manner comparable to the applicability of the exemption for group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer.

Some commenters supported including, in the expanded exemptions, institutions of higher education that provide health coverage for students through student health plans but have religious objections to providing certain contraceptive coverage. They said that religious exemptions allow freedom for certain religious institutions of higher education to exist, and this in turn gives students the choice of institutions that hold different views on important issues such as contraceptives and abortifacients. Other commenters opposed including the exemption, asserting that expanding the exemptions would negatively impact female students because institutions of higher education might not cover contraceptives in student health plans, women enrolled in those plans would not receive access to birth control, and an increased number of unintended pregnancies would result among those women.

In the Departments’ view, the reasons for extending the exemptions to institutions of higher education are similar to the reasons, discussed above, for extending the exemption to other nonprofit organizations. Only a minority of students in higher education receive health insurance coverage from plans arranged by their colleges or universities.<sup>66</sup> It is necessarily true that an even smaller number receive such coverage from religious schools, and from religious or other private schools that object to arranging contraceptive coverage. Religious institutions of higher education are private entities with religious missions. Various commenters asserted the importance, to many of those institutions, of being able to adhere to their religious tenets. Indeed, many students who attend such institutions do so because of the institutions’ religious tenets. No

student is required to attend such an institution. At a minimum, students who attend private colleges and universities have the ability to ask those institutions in advance what religious tenets they follow, including whether the institutions will provide contraceptives in insurance plans they arrange. Some students wish to receive contraceptive coverage from a health plan arranged by an institution of higher education. But other students wish to attend an institution of higher education that adheres to its religious mission about contraceptives in health insurance. And still other students favor contraception, but are willing to attend a religious university without forcing it to violate its beliefs about contraceptive coverage. Exempting religious institutions that object to contraceptive coverage still allows contraceptive coverage to be provided by institutions of higher education more broadly. The exemption simply makes it legal under federal law for institutions to adhere to religious beliefs that oppose contraception, without facing penalties for non-compliance that could threaten their existence. This removes a possible barrier to diversity in the nation’s higher education system, and makes it more possible for students to attend institutions of higher education that hold those views.

In addition, under the previous exemption and accommodation, it was possible for self-insured church plans exempt from ERISA that have religious objection to certain contraceptives to avoid any requirement that either they or their third party administrators provide contraceptive coverage. As seen in some public comments and litigation statements, some such self-insured church plans provide health coverage for students at institutions of higher education covered by those church plans. In order to avoid the situation where some student health plans sponsored by institutions with religious objections are effectively exempt from the contraceptive Mandate, and other student health plans sponsored by other institutions with similar religious objections are

<sup>66</sup>The American College Health Association estimates that, in 2014, student health insurance plans at colleges and universities covered “more than two million college students nationwide.” “Do You Know Why Student Health Insurance Matters?” available at [https://www.acha.org/documents/Networks/Coalitions/Why\\_SHIPs\\_Matter.pdf](https://www.acha.org/documents/Networks/Coalitions/Why_SHIPs_Matter.pdf). We assume for the purposes of this estimate that those plans covered 2,100,000 million students. Data from the Department of Education shows that in 2014, there were 20,207,000 students enrolled in degree-granting postsecondary institutions. National Center for Education Statistics, Table 105.20, “Enrollment in elementary, secondary, and degree-granting postsecondary institutions, by level and control of institution, enrollment level, and attendance status and sex of student: Selected years, fall 1990 through fall 2026,” available at [https://nces.ed.gov/ipeds/data/ipedsdatatools/tables/d16\\_105.20.asp?current=yes](https://nces.ed.gov/ipeds/data/ipedsdatatools/tables/d16_105.20.asp?current=yes).



required to comply with the Mandate, the Departments consider it appropriate to extend the exemption, so that religious colleges and universities with objections to the Mandate would not be treated differently in this regard.

The Departments also note that the ACA does not require institutions of higher education to provide student health insurance coverage. As a result, some institutions of higher education that object to the Mandate appear to have chosen to stop arranging student health insurance plans, rather than comply with the Mandate or be subject to the accommodation.<sup>67</sup> Extending the exemption in these rules removes an obstacle to such entities deciding to offer student health insurance plans, thereby giving students another health insurance option.

As noted above, it is not clear that studies discussing various effects of birth control access clearly and specifically demonstrate a negative impact to students in higher education because of the expanded exemption in these final rules. The Departments consider these expanded exemptions to be an appropriate and permissible policy choice in light of various interests at stake and the lack of a statutory requirement for the Departments to impose the Mandate on entities and plans that qualify for these expanded exemptions.

Finally, the Religious IFC specified that the plan sponsor exemption applied to “non-governmental” plan sponsors (§ 147.132(a)(1)(i)), including “[a]ny other non-governmental employer” (§ 147.132(a)(1)(i)(E)). Then, in § 147.132(a)(1)(ii), the rule specified that the institution of higher education exemption applicable to the arrangement of student health insurance coverage applied “in a manner comparable to its applicability to group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer.” Consequently, the Religious IFC’s expanded exemptions only applied to non-governmental institutions of higher education, including for student health insurance coverage, not to governmental institutions of

higher education. Nevertheless, the term “non-governmental,” while appearing twice in § 147.132(a)(1)(i) concerning plan sponsors, was not repeated in § 147.132(a)(1)(ii). To more clearly specify that this limitation was intended to apply to § 147.132(a)(1)(ii), we finalize this paragraph with a change by adding the phrase “which is non-governmental” after the phrase “An institution of higher education as defined in 20 U.S.C. 1002”.

*L. Health Insurance Issuers (45 CFR 147.132(a)(1)(iv))*

The previous regulations did not exempt health insurance issuers. However, the Religious IFC included in its list of exemptions at § 147.132(a)(1)(iii), “[a] health insurance issuer offering group or individual insurance coverage to the extent the issuer objects as specified in paragraph (a)(2) of this section. Where a health insurance issuer providing group health insurance coverage is exempt under this paragraph (a)(1)(iii), the plan remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement[.]” These rules finalize this exemption with technical changes to clarify the language based on public comments, and redesignate the paragraph as § 147.132(a)(1)(iv).

The Religious IFC extends the exemption to health insurance issuers offering group or individual health insurance coverage that sincerely hold their own religious objections to providing coverage for contraceptive services. Under this exemption, the only plan sponsors—or in the case of individual insurance coverage, individuals—who are eligible to purchase or enroll in health insurance coverage offered by an exempt issuer that does not cover some or all contraceptive services, are plan sponsors or individuals who themselves object and whose plans are otherwise exempt based on their objection. An exempt issuer can then offer an exempt health insurance product to an entity or individual that is exempt based on either the moral exemptions for entities

and individuals, or the religious exemptions for entities and individuals. Thus, the issuer exemption specifies that, where a health insurance issuer providing group health insurance coverage is exempt under paragraph (a)(1)(iii) of this section, the plan remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv), unless it is also exempt from that requirement.

Under these rules, issuers that hold their own objections, based on sincerely held religious beliefs, could issue policies that omit contraception to plan sponsors or individuals that are otherwise exempt based on their religious beliefs, or on their moral convictions under the companion final rules published elsewhere in today’s **Federal Register**. Likewise, issuers with sincerely held moral convictions, that are exempt under those companion final rules, could issue policies that omit contraception to plan sponsors or individuals that are otherwise exempt based on either their religious beliefs or their moral convictions.

In the separate companion IFC to the Religious IFC—the Moral IFC—the Departments provided a similar exemption for issuers in the context of moral objections, but we used slightly different operative language. There, in the second sentence, instead of saying “the plan remains subject to any requirement to provide coverage for contraceptive services,” the exemption stated, “the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services.” Some commenters took note of this difference, and asked the Departments to clarify which language applies, and whether the Departments intended any difference in the operation of the two paragraphs. The Departments did not intend the language to operate differently. The language in the Moral IFC accurately, and more clearly, expresses the intent set forth in the Religious IFC about how the issuer exemption applies. Consequently, these rules finalize the issuer exemption paragraph from the Religious

<sup>67</sup>See, e.g., Manya Brachear Pashman, “Wheaton College ends coverage amid fight against birth control mandate,” Chicago Tribune, July 29, 2015; Laura Bassett, “Franciscan University Drops Entire Student Health Insurance Plan Over Birth Control Mandate,” HuffPost, May 15, 2012.



IFC with minor technical changes so that the final language will mirror language from the Moral IFC, stating that the exemption encompasses: “[a] health insurance issuer offering group or individual insurance coverage to the extent the issuer objects as specified in paragraph (a)(2) of this section. Where a health insurance issuer providing group health insurance coverage is exempt under paragraph (a)(1)(iv) of this section, the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement[.]”

Some commenters supported including this exemption for issuers in these rules, both to protect the religious exercise of issuers, and so that in the future religious issuers that may wish to specifically serve religious plan sponsors would be free to organize. Other commenters objected to including an exemption for issuers. Some objected that issuers cannot exercise religious beliefs, while others objected that exempting issuers would threaten contraceptive coverage for women. Some commenters said that it was arbitrary and capricious for the Departments to provide an exemption for issuers if we do not know that issuers with qualifying religious objections exist.

The Departments consider it appropriate to provide this exemption for issuers. Because the issuer exemption only applies where an independently exempt policyholder (entity or individual) is involved, the issuer exemption will not serve to remove contraceptive coverage obligations from any plan or plan sponsor that is not also exempt, nor will it prevent other issuers from being required to provide contraceptive coverage in individual or group insurance coverage. The issuer exemption therefore serves several interests, even though the Departments are not currently aware of existing issuers that would use it. As noted by some commenters, allowing issuers to be exempt, at least with respect to plan sponsors and plans that indepen-

dently qualify for an exemption, will remove a possible obstacle to religious issuers being organized in the future to serve entities and individuals that want plans that respect their religious beliefs or moral convictions. Furthermore, permitting issuers to object to offering contraceptive coverage based on sincerely held religious beliefs will allow issuers to continue to offer coverage to plan sponsors and individuals, without subjecting them to liability under section 2713(a)(4), or related provisions, for their failure to provide contraceptive coverage. In this way, the issuer exemption serves to protect objecting issuers from being required to issue policies that cover contraception in violation of the issuers’ sincerely held religious beliefs, and from being required to issue policies that omit contraceptive coverage to non-exempt entities or individuals, thus subjecting the issuers to potential liability if those plans are not exempt from the Guidelines.

The Departments reject the proposition that issuers cannot exercise religious beliefs. First, since RFRA protects the religious exercise of corporations as persons, the religious exercise of health insurance issuers—which are generally organized as corporations—is protected by RFRA. In addition, many federal health care conscience laws and regulations specifically protect issuers or plans. For example, 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3) protect plans or managed care organizations in Medicaid or Medicare Advantage. The Weldon Amendment specifically protects, among other entities, provider-sponsored organizations, health maintenance organizations (HMOs), health insurance plans, and “any other kind of health care facilit[ies], organization[s], or plan[s]” as a “health care entity” from being required to pay for, or provide coverage of, abortions. *See for example*, Consolidated Appropriations Act of 2018, Pub. L. No. 115–141, Div. H, Sec. 507(d), 132 Stat. 348, 764 (Mar. 23, 2018).<sup>68</sup> Congress also declared this year that “it is the intent of Congress” to include a “conscience clause” which provides exceptions for religious beliefs if the District of Columbia requires “the

provision of contraceptive coverage by health insurance plans.” *See id.* at Div. E, Sec. 808, 132 Stat. at 603. In light of the clearly expressed intent of Congress to protect religious liberty, particularly in certain health care contexts, along with the specific efforts to protect issuers, the Departments have concluded that an exemption for issuers is appropriate.

The issuer exemption does not specifically include third party administrators, although the optional accommodation process provided under these final rules specifies that third party administrators cannot be required to contract with an entity that invokes that process. Some religious third party administrators have brought suit in conjunction with suits brought by organizations enrolled in ERISA-exempt church plans. Such plans are now exempt under these final rules, and their third party administrators, as claims processors, are under no obligation under section 2713(a)(4) to provide benefits for contraceptive services, as that section applies only to plans and issuers. In the case of ERISA-covered plans, plan administrators are obligated under ERISA to follow the plan terms, but it is the Departments’ understanding that third party administrators are not typically designated as plan administrators, and, therefore, would not normally act as plan administrators, under section 3(16) of ERISA. Therefore, to the Departments’ knowledge, it is only under the existing accommodation process that third party administrators are required to undertake any obligations to provide or arrange for contraceptive coverage to which they might object. These rules make the accommodation process optional for employers and other plan sponsors, and specify that third party administrators that have their own objection to complying with the accommodation process may decline to enter into, or decline to continue, contracts as third party administrators of such plans.

<sup>68</sup>ACA section 1553 protects an identically defined group of “health care entities,” including provider-sponsored organizations, HMOs, health insurance plans, and “any other kind of . . . plan,” from being subject to discrimination on the basis that it does not provide any health care item or service furnishing for the purpose of assisted suicide, euthanasia, mercy killing, and the like. ACA section 1553, 42 U.S.C. 18113.

*M. Description of the Religious Objection (45 CFR 147.132(a)(2))*

The previous regulations did not specify what, if any, religious objection applied to its exemption; however, the Religious IFC set forth the scope of the religious objection of objecting entities in § 147.132(a)(2), as follows: “The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its sincerely held religious beliefs.” These rules finalize this description with technical changes to clarify the scope of the objection as intended in the Religious IFC, and based on public comments.

Throughout the exemptions for objecting entities, the rules specify that they apply where the entities object as specified in § 147.132(a)(2) of the Religious IFC. That paragraph describes the religious objection by specifying that exemptions for objecting entities will apply to the extent that an entity described in paragraph (a)(1) objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its sincerely held religious beliefs.

In the separate companion IFC to the Religious IFC—the Moral IFC—the Departments, at § 147.133(a)(2), provided a similar description of the scope of the objection based on moral convictions rather than religious beliefs, but we used slightly different operative language. There, instead of saying the entity “objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services,” the paragraph stated the entity “objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage or payments for some or all contraceptive services, or for a plan, issuer, or third party administrator that provides or arranges such coverage or payments.” Some

commenters took note of this difference, and asked the Departments to clarify which language applies, and whether the Departments intended any difference in the operation of the two paragraphs. The Departments did not intend the language to operate differently. The language in the Moral IFC accurately, and more clearly, expresses the intent set forth in the Religious IFC about how the issuer exemption applies. The Religious IFC explained that the intent of the expanded exemptions was to encompass entities that objected to providing or arranging for contraceptive coverage in their plans, and to encompass entities that objected to the previous accommodation process, by which their issuers or third party administrators were required to provide contraceptive coverage or payments in connection with their plans. In other words, an entity would be exempt from the Mandate if it objected to complying with the Mandate, or if it objected to complying with the accommodation. The language in the Religious IFC encompassed both circumstances by encompassing an objection to providing “coverage [or] payments” for contraceptive services, and by encompassing an objection to “a plan that provides” coverage or payments for contraceptive services. But the language describing the objection set forth in the Moral IFC does so more clearly, and restructuring the sentence could make it clearer still. Questions by commenters about the scope of the description suggests that we should restructure the description, in a non-substantive way, to provide more clarity. The Departments do this by breaking some of the text out into subparagraphs, and rearranging clauses so that it is clearer which words they modify. The new structure specifies that it includes an objection to establishing, maintaining, providing, offering, or arranging for (as applicable) coverage or payments for contraceptive services, and it includes an objection to establishing, maintaining, providing, offering, or arranging for (as applicable) a plan, issuer, or third party administrator that provides contraceptive coverage. This more clearly encompasses objections to complying with either the Mandate or the accommodation. Consequently, these rules finalize the paragraph describing the religious objection in the Religious IFC with minor

technical changes so that the final language will essentially mirror language from the Moral IFC. The introductory phrase of the religious objection set forth in paragraph (a)(2) is finalized to state the exemption “will apply to the extent that an entity described in paragraph (a)(1) of this section objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for (as applicable)”. The remainder of the paragraph is broken into two subparagraphs, regarding either “coverage or payments for some or all contraceptive services,” or “a plan, issuer, or third party administrator that provides or arranges such coverage or payments.”

Some commenters observed that by allowing exempt groups to object to “some or all” contraceptives, this might yield a cafeteria-style approach where different plan sponsors choose various combinations of contraceptives that they wish to cover. Some commenters further observed that this might create a burden on issuers or third party administrators. The Departments have concluded, however, that, just as the exemption under the previous regulations allowed entities to object to some or all contraceptives, it is appropriate to maintain that flexibility for entities covered by the expanded exemption. Notably, even where an entity or individual qualifies for an exemption under these rules, these rules do not require the issuer or third party administrator to contract with that entity or individual if the issuer or third party administrator does not wish to do so, including because the issuer or third party administrator does not wish to offer an unusual variation of a plan. These rules simply remove the federal Mandate that, in some cases, could have led to penalties for an employer, issuer, or third party administrator if they wished to sponsor, provide, or administer a plan that omits contraceptive coverage in the presence of a qualifying religious objection. Similarly, under the previous exemption, the plans of houses of worship and integrated auxiliaries were exempt from offering some or all contraceptives, but the previous regulations did not require issuers and third party administrators to contract with those exempt entities if they chose not to do so.

*N. Individuals (45 CFR 147.132(b))*

The previous regulations did not provide an exemption for objecting individuals. However, the Religious IFC expanded the exemptions to encompass objecting individuals (referred to here as the “individual exemption”), at § 147.132(b). These rules finalize the individual exemption from the Religious IFC with changes, which reflect both non-substantial technical revisions, and changes based on public comments to more clearly express the intent of the Religious IFC.

In the separate companion IFC to the Religious IFC—the Moral IFC—the Departments, at § 147.133(b), provided a similar individual exemption, but we used slightly different operative language. Where the Religious IFC described what may be offered to objecting individuals as “a separate benefit package option, or a separate policy, certificate or contract of insurance,” the Moral IFC said a willing issuer and plan sponsor may offer “a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any individual who objects” under the individual exemption. Some commenters observed this difference and asked whether the language was intended to encompass the same options. The Departments intended these descriptions to include the same scope of options. Some commenters suggested that the individual exemption should not allow the offering of “a separate group health plan,” as set forth in the version found in § 147.133(b), because doing so could cause various administrative burdens. The Departments disagree, since group health plan sponsors and group and individual health insurance issuers would be free to decline to provide that option, including because of administrative burdens. In addition, the Departments wish to clarify that, where an employee claims the exemption, a willing issuer and a willing employer may, where otherwise permitted, offer the employee participation in a group health insurance policy or benefit option that complies with the employee’s objection. Consequently, these rules finalize the individual exemption by making a technical change to the language to adopt the formulation, “a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health

plan sponsor (with respect to an individual) or individual, as applicable, who objects” under the individual exemption.

Some commenters supported the individual exemption as providing appropriate protections for the religious beliefs of individuals who obtain their insurance coverage in such places as the individual market or exchanges, or who obtain coverage from a group health plan sponsor that does not object to contraceptive coverage but is willing (and, as applicable, the issuer is also willing) to provide coverage that is consistent with an individual’s religious objections. Some commenters also observed that, by specifying that the individual exemption only operates where the plan sponsor and issuer, as applicable, are willing to provide coverage that is consistent with the objection, the exemption would not impose burdens on the insurance market because the possibility of such burdens would be factored into the willingness of an employer or issuer to offer such coverage. Other commenters disagreed and contended that allowing the individual exemption would cause burden and confusion in the insurance market. Some commenters also suggested that the individual exemption should not allow the offering of a separate group health plan because doing so could cause various administrative burdens.

The Departments agree with the commenters who suggested the individual exemption will not burden the insurance market, and, therefore, conclude that it is appropriate to provide the individual exemption where a plan sponsor and, as applicable, issuer are willing to cooperate in doing so. As discussed in the Religious IFC, the individual exemption only operates in the case where the group health plan sponsor or group or individual market health insurance issuer is willing to provide the separate option; in the case of coverage provided by a group health plan sponsor, where the plan sponsor is willing; or in the case where both a plan sponsor and issuer are involved, both are willing. The Departments conclude that it is appropriate to provide the individual exemption so that the Mandate will not serve as an obstacle among these various options. Practical difficulties that may be implicated by one option or another will likely be factored into whether plan spon-

sors and issuers are willing to offer particular options in individual cases.

In addition, Congress has provided several protections for individuals who object to prescribing or providing contraceptives contrary to their religious beliefs. *See for example*, Consolidated Appropriations Act of 2018, Div. E, Sec. 726(c) (Financial Services and General Government Appropriations Act), Pub. L. No. 115–141, 132 Stat. 348, 593–94 (Mar. 23, 2018). While some commenters proposed to construe this provision narrowly, Congress likewise provided that, if the District of Columbia requires “the provision of contraceptive coverage by health insurance plans,” “it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions”. *Id.* at Div. E, Sec. 808, 132 Stat. at 603. A religious exemption for individuals would not be effective if the government simultaneously made it illegal for issuers and group health plans to provide individuals with policies that comply with the individual’s religious beliefs.

The individual exemption extends to the coverage unit in which the plan participant, or subscriber in the individual market, is enrolled (for instance, to family coverage covering the participant and his or her beneficiaries enrolled under the plan), but does not relieve the plan’s or issuer’s obligation to comply with the Mandate with respect to the group health plan generally, or, as applicable, to any other individual policies the issuer offers.

This individual exemption allows plan sponsors and issuers that do not specifically object to contraceptive coverage to offer religiously acceptable coverage to their participants or subscribers who do object, while offering coverage that includes contraception to participants or subscribers who do not object. This individual exemption can apply with respect to individuals in plans sponsored by private employers or governmental employers.

By its terms, the individual exemption would also apply with respect to individuals in plans arranged by institutions of higher education, if the issuers offering those plans were willing to provide plans complying with the individuals’ objec-



tions. Because federal law does not require institutions of higher education to arrange such plans, the institutions would not be required by these rules to arrange a plan compliant with an individual's objection if the institution did not wish to do so.

As an example, in one lawsuit brought against the Departments, the State of Missouri enacted a law under which the State is not permitted to discriminate against insurance issuers that offer group health insurance policies without coverage for contraception based on employees' religious beliefs, or against the individual employees who accept such offers. *See Wieland*, 196 F. Supp. 3d at 1015–16 (quoting Mo. Rev. Stat. 191.724). Under the individual exemption of these final rules, employers sponsoring governmental plans would be free to honor the objections of individual employees by offering them plans that omit contraceptive coverage, even if those governmental entities do not object to offering contraceptive coverage in general.

This individual exemption cannot be used to force a plan (or its sponsor) or an issuer to provide coverage omitting contraception, or, with respect to health insurance coverage, to prevent the application of State law that requires coverage of such contraceptives or sterilization. Nor can the individual exemption be construed to require the guaranteed availability of coverage omitting contraception to a plan sponsor or individual who does not have a sincerely held religious objection. This individual exemption is limited to the requirement to provide contraceptive coverage under section 2713(a)(4), and does not affect any other federal or State law governing the plan or coverage. Thus, if there are other applicable laws or plan terms governing the benefits, these final rules do not affect such other laws or terms.

Some individuals commented that they welcomed the individual exemption so that their religious beliefs were not forced to be in tension with their desire for health coverage. The Departments believe the individual exemption may help to meet the ACA's goal of increasing health coverage because it will reduce the incidence of

certain individuals choosing to forego health coverage because the only coverage available would violate their sincerely held religious beliefs.<sup>69</sup> At the same time, this individual exemption “does not undermine the governmental interests furthered by the contraceptive coverage requirement,”<sup>70</sup> because, when the exemption is applicable, the individual does not want the coverage, and therefore would not use the objectionable items even if they were covered.

Some commenters welcomed the ability of individuals covered by the individual exemption to be able to assert an objection to either some or all contraceptives. Other commenters expressed concern that there might be multiple variations in the kinds of contraceptive coverage to which individuals object, and this might make it difficult for willing plan sponsors and issuers to provide coverage that complies with the religious beliefs of an exempt individual. As discussed above, where the individual exemption applies, it only affects the coverage of an individual. If an individual only objects to some contraceptives, and the individual's issuer and, as applicable, plan sponsor are willing to provide the individual a package of benefits omitting such coverage, but for practical reasons they can only do so by providing the individual with coverage that omits all—not just some—contraceptives, the Departments believe that it favors individual freedom and market choice, and does not harm others, to allow the issuer and plan sponsor to provide, in that case, a plan omitting all contraceptives if the individual is willing to enroll in that plan. The language of the individual exemption set forth in the Religious IFC implied this conclusion, by specifying that the Guidelines requirement of contraceptive coverage did not apply where the individual objected to some or all contraceptives. Notably, this was different than the language applicable to the exemptions under § 147.132(a), which specifies that the exemptions apply “to the extent” of the religious objections, so that, as discussed above, the exemptions include only those contraceptive methods to which the objection applied. In response to comments suggesting the language of the individual ex-

emption was not sufficiently clear on this distinction, however, the Departments in these rules finalize the individual exemption at § 147.133(b) with the following change, by adding the following sentence at the end of the paragraph: “Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the individual with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.”

Some commenters asked for plain language guidance and examples about how the individual exemption might apply in the context of employer-sponsored insurance. Here is one such example. An employee is enrolled in group health coverage through her employer. The plan is fully insured. If the employee has sincerely held religious beliefs objecting to her plan including coverage for contraceptives, she could raise this with her employer. If the employer is willing to offer her a plan that omits contraceptives, the employer could discuss this with the insurance agent or issuer. If the issuer is also willing to offer the employer, with respect to this employee, a group health insurance policy that omits contraceptive coverage, the individual exemption would make it legal for the group health insurance issuer to omit contraceptives for her and her beneficiaries under a policy, for her employer to sponsor that plan for her, and for the issuer to issue such a plan to the employer, to cover that employee. This would not affect other employees' plans—those plans would still be subject to the Mandate and would continue to cover contraceptives. But if either the employer, or the issuer, is not willing (for whatever reason) to offer a plan or a policy for that employee that omits contraceptive coverage, these rules do not require them to. The employee would have the choice of staying enrolled in a plan with its coverage of contraceptives, not enrolling in that plan, seeking coverage elsewhere, or seeking employment elsewhere.

<sup>69</sup>See also, for example, *Wieland*, 196 F. Supp. 3d at 1017, and *March for Life*, 128 F. Supp. 3d at 130, where the courts noted that the individual employee plaintiffs indicated that they viewed the Mandate as pressuring them to “forgo health insurance altogether.”

<sup>70</sup>78 FR 39874.



For all these reasons, these rules adopt the individual exemption language from the Religious IFC with clarifying changes to reflect the Departments' intent.

*O. Accommodation (45 CFR 147.131, 26 CFR 54.9815–2713A, 29 CFR 2590.715–2713A)*

The previous regulations set forth an accommodation process at 45 CFR 147.131, 26 CFR 54.9815–2713A, and 29 CFR 2590.715–2713A, as an alternative method of compliance with the Mandate. Under the accommodation, if a religious nonprofit entity, or a religious closely held for-profit business, objected to coverage of some or all contraceptive services in its health plan, it could file a notice or fill out a form expressing this objection and describing its objection to its plan and issuer or third party administrator. Upon doing so, the plan would not cover some or all contraceptive services, and the issuer or third party administrator would be responsible for providing or arranging for persons covered by the plan to receive coverage or payments of those services (except in the case of self-insured church plans exempt from ERISA, in which case no such obligation was imposed on the third party administrator). The accommodation was set forth in regulations of each of the Departments. Based on each Department's regulatory authority, HHS regulations applied to insured group health plans, and DOL and Treasury regulations applied to both insured group health plans and self-insured group health plans.

The Religious IFC maintained the accommodation process. Nevertheless, by virtue of expanding the exemptions to encompass all entities that were eligible for the accommodation process under the previous regulations, in addition to other newly exempt entities, the Religious IFC rendered the accommodation process optional. Entities could choose not just between the Mandate and the accommodation, but between the Mandate, the exemption, and the accommodation. These rules finalize the optional accommodation process and its location in the Code of Federal Regulations at 45 CFR 147.131, 26 CFR 54.9815–

2713A, and 29 CFR 2590.715–2713A, but the Departments do so with several changes based on public comments.

Many commenters supported keeping the accommodation as an optional process, including some commenters who otherwise supported creating the expanded exemptions. Some commenters opposed making the accommodation optional, but asked the Departments to return to the previous regulations in which entities that did not meet the narrower exemption could only choose between the accommodation process or direct compliance with the Mandate. Some commenters believed there should be no exemptions and no accommodation process.

The Departments continue to consider it appropriate to make the accommodation process optional for entities that are otherwise also eligible for the expanded exemptions—that is, to keep it in place as an option that exempt entities can choose. The accommodation provides contraceptive access, which is a result many opponents of the expanded exemptions said they desire. The accommodation involves some regulation of issuers and third party administrators, but the previous regulations had already put that regulatory structure in place. These rules for the most part merely keep it in place and maintain the way it operates. The Religious IFC adds some additional paperwork burdens as a result of the new interaction between the accommodation and the expanded exemptions; those are discussed below.

Above, the Departments discussed public comments concerning whether we should have merely expanded the accommodation rather than expanding the exemptions. The Religious IFC and these final rules expand the kinds of entities that may use the optional accommodation, by expanding the exemptions and allowing any exempt entities to opt to make use of the accommodation. Consequently, under these rules, objecting employers may make use of the exemption or may choose to utilize the optional accommodation process. If an eligible organization uses the optional accommodation process through the EBSA Form 700 or other specified notice to HHS, it voluntarily shifts an obligation to provide

separate but seamless contraceptive coverage to its issuer or third party administrator.

Some commenters asked that these final rules create an alternative payment mechanism to cover contraceptive services for third party administrators obligated to provide or arrange such coverage under the accommodation. These rules do not concern the payment mechanism, which is set forth in separate rules at 45 CFR 156.50. The Departments do not view an alternative payment mechanism as necessary. As discussed below, although the Departments do not know how many entities will use the accommodation, it is reasonably likely that some entities previously using it will continue to do so, while others will choose the expanded exemption, leading to an overall reduction in the use of the accommodation. The Departments have reason to believe that these final rules will not lead to a significant expansion of entities using the accommodation, since nearly all of the entities of which the Departments are aware that may be interested in doing so were already able to do so prior to the Religious IFC. Moreover, it is still the case under these rules that if an entity serving as a third party administrator does not wish to satisfy the obligations it would need to satisfy under an accommodation, it could choose not to contract with an entity that opts into the accommodation. This conflict is even less likely now that entities eligible for the accommodation are also eligible for the exemption. For these reasons, the Departments do not find it necessary to add an additional payment mechanism for the accommodation process.

If an eligible organization wishes to revoke its use of the accommodation, it can do so under these rules, and operate under its exempt status. As part of its revocation, the issuer or third party administrator of the eligible organization must provide participants and beneficiaries written notice of such revocation. Some commenters suggested HHS has not yet issued guidance on the revocation process, but CCIIO provided guidance concerning this process on November 30, 2017.<sup>71</sup> These rules supersede that guid-

<sup>71</sup>See Randy Pate, "Notice by Issuer or Third Party Administrator for Employer/Plan Sponsor of Revocation of the Accommodation for Certain Preventive Services," CMS (Nov. 30, 2017), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Notice-Issuer-Third-Party-Employer-Preventive.pdf>.

ance, and adopt or modify its specific guidelines as explained below. As a result, these rules delete references, set forth in the Religious IFC's accommodation regulations, to "guidance issued by the Secretary of the Department of Health and Human Services."

The guidance stated that an entity that was using the accommodation under the previous rules, or an entity that adopts the accommodation maintained by the IFCs, could revoke its use of the accommodation and use the exemption. This guideline applies under the final rules. This revocation process applies both prospectively to eligible organizations that decide at a later date to avail themselves of the optional accommodation and then decide to revoke that accommodation, as well as to organizations that invoked the accommodation prior to the effective date of the Religious IFC either by their submission of an EBSA Form 700 or notification, or by some other means under which their third party administrator or issuer was notified by DOL or HHS that the accommodation applies.

The guidance stated that, when the accommodation is revoked by an entity using the exemption, the issuer of the eligible organization must provide participants and beneficiaries written notice of such revocation. These rules adopt that guideline. Consistent with other applicable laws, the issuer or third party administrator of an eligible organization must promptly notify plan participants and beneficiaries of the change of status to the extent such participants and beneficiaries are currently being offered contraceptive coverage at the time the accommodated organization invokes its exemption. The guidance further stated that the notice may be provided by the organization itself, its group health plan, or its third party administrator, as applicable. The guidance stated that, under the regulation at 45 CFR 147.200(b), "[t]he notice of modification must be provided in a form that is consis-

tent with the rules of paragraph (a)(4) of this section," and (a)(4) has detailed rules on when electronic notice is permitted. These guidelines still apply under the final rules. These rules adopt those guidelines.

The guidance further specified that the revocation of the accommodation would be effective notice on the first day of the first plan year that begins on or after 30 days after the date of the revocation, or alternatively, whether or not the objecting entity's group health plan or issuer listed the contraceptive benefit in its Summary of Benefits of Coverage (SBC), the group health plan or issuer could revoke the accommodation by giving at least 60-days prior notice pursuant to section 2715(d)(4) of the PHS Act (incorporated into ERISA and the Code)<sup>72</sup> and applicable regulations thereunder to revoke the accommodation. The guidance noted that, unlike the SBC notification process, which can effectuate a modification of benefits in the middle of a plan year, provided it is allowed by State law and the contract of the policy, the 30 day notification process under the guidance can only effectuate a benefit modification at the beginning of a plan year. This part of the guidance is adopted in part and changed in part by these final rules, as follows, based on public comments on the issue.

Some commenters asked that revocations only be permitted to occur on the first day of the next plan year, or no sooner than January 2019, to avoid burdens on plans and because some states do not allow for mid-year plan changes. The Departments believe that providing 60-days notice pursuant to section 2715(d)(4) of the PHS Act, where applicable, is a mechanism that already exists for making changes in health benefits covered by a group health plan during a plan year; that process already takes into consideration any applicable state laws. However, in response to public comments, these rules change the accommodation provisions from the Religious IFC to indicate that, as

a transitional rule, providing 60-days notice for revoking an accommodation is only available, if applicable, to plans that are using the accommodation at the time of the publication of these final rules. As a general rule, for plans that use the accommodation in future plan years, the Departments believe it is appropriate to allow revocation of an accommodation only on the first day of the next plan year. Based on the objections of various litigants and public commenters, we believe that some entities already using the accommodation may have been doing so only because previous regulations denied them an exemption. For them, access to the transitional 60-days notice procedure (if applicable) is appropriate in the period immediately following the finalization of these rules. In future plan years, however—plan years that begin after the effective date of these final rules—plans and entities that qualify as exempt under these rules will have been on notice that they qualify for an exemption or the accommodation. If they have opted to enter or remain in the accommodation in those future plan years, when they could have chosen the exemption, the Departments believe it is appropriate for them to wait until the first day of the following plan year to change to exempt status.<sup>73</sup>

This change is implemented in the following manner. In the Religious IFC, the accommodation provisions addressing revocation were found at 45 CFR 147.131(c)(4), 26 CFR 54.9815-2713AT(a)(5)<sup>74</sup>, and 29 CFR 2590.715-2713A(a)(5).

The provisions in the Religious IFC (with technical variations among the HHS, Labor, and Treasury rules) state that a written notice of revocation must be provided "as specified in guidance issued by the Secretary of the Department of Health and Human Services." On November 30, 2017, HHS issued the guidance regarding revocation. These final rules incorporate this guidance, with certain clarifications, and state that the revocation

<sup>72</sup>See also 26 CFR 54.9815-2715(b); 29 CFR 2590.715-2715(b); 45 CFR 147.200(b).

<sup>73</sup>These final rules go into effect 60 days after they are published in the **Federal Register**. Some entities currently using the accommodation may have a plan year that begins less than 30 days after the effective date of these final rules. In such cases, they may be unable, after the effective date of these final rules, to provide a revocation notice 30 days prior to the start of their next plan year. However, these final rules will be published at least 60 days prior to the start of that plan year. Therefore, entities exempt under these final rules that have been subject to the accommodation on the date these final rules are published, that wish to revoke the accommodation, and whose next plan years start after these final rules go into effect, but less than 30 days thereafter, may submit their 30 day revocation notices after these final rules are published, before these final rules are in effect, so that they will have submitted the revocation at least 30 days before their next plan year starts. In such cases, even though the revocation notice will be submitted before these final rules are in effect, the actual revocation will not occur until after these final rules are in effect, and plan participants will have been provided with 30 days' notice of the revocation.

<sup>74</sup>The Department of the Treasury's rule addressing the accommodation is being finalized at 26 CFR 54.9815-2713A, superseding its temporary regulation at 26 CFR 54.9815-2713AT.

notice must be provided “as specified herein.” The final rule incorporates the two sets of directions for revoking the accommodation initially set forth in the interim guidance in the following manner. The first, designated as subparagraph (1) as a “[t]ransitional rule,” explains that if contraceptive coverage is being offered through the accommodation process on the date on which these final rules go into effect, 60-days notice may be provided to revoke the accommodation process, or they revocation may occur “on the first day of the first plan year that begins on or after 30 days after the date of the revocation” consistent with PHS Act section 2715(d)(4), 45 CFR 147.200(b), 26 CFR 54.9815–2715(b), or 29 CFR 2590.715–2715(b). The second direction, set forth in subparagraph (ii), explains the “[g]eneral rule” that, in plan years beginning after the date on which these final rules go into effect, revocation of the accommodation will be effective on “the first day of the first plan year that begins on or after 30 days after the date of the revocation.”

The Religious IFC states that if an accommodated entity objects to some, but not all, contraceptives, an issuer for an insured group health plan that covers contraceptives under the accommodation may, at the issuer’s option, choose to provide coverage or payments for all contraceptive services, instead of just for the narrower set of contraceptive services to which the entities object. Some commenters supported this provision, saying that it allows flexibility for issuers that might otherwise face unintended burdens from providing coverage under the accommodation for entities that object to only some contraceptive items. The Departments have maintained this provision in these final rules. Note that this provision is consistent with the other assertions in the rules saying that an entity’s objection applies “to the extent” of the entity’s religious beliefs, because in this instance, under the accommodation, the plan participant or beneficiary still receives coverage or payments for all contraceptives, and this provision simply allows issuers more flexibility in choosing how to help provide that coverage.

Some commenters asked that the Departments retain the “reliance” provision,

contained in the previous accommodation regulations, under which an issuer is deemed to have complied with the Mandate where the issuer relied reasonably and in good faith on a representation by an eligible organization as to its eligibility for the accommodation, even if that representation was later determined to be incorrect. The Departments omitted this provision from the Religious IFC, on the grounds that this provision was less necessary where any organization eligible for the optional accommodation is also exempt. Nevertheless, in order to respond to concerns in public comments, and to prevent any risk to issuers of a mistake or misrepresentation by an organization seeking the accommodation process, the Departments have finalized the Religious IFC with an additional change that restores this clause. The clause uses the same language that was in the regulations prior to the Religious IFC, and it is inserted at 45 CFR 147.131(f), 26 CFR 54.9815–2713A(e), and 29 CFR 2590.715–2713A(e). As a result, these rules renumber the subsequent paragraphs in each of those sections.

#### *P. Definition of Contraceptives for the Purpose of These Final Rules*

The previous regulations did not define contraceptive services. The Guidelines issued in 2011 included, under “Contraceptive methods and counseling,” “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” The previous regulations concerning the exemption and the accommodation used the terms contraceptive services and contraceptive coverage as catch-all terms to encompass all of those Guidelines’ requirements. The 2016 update to the Guidelines are similarly worded. Under “Contraception,” they include the “full range of contraceptive methods for women currently identified by the U.S. Food and Drug Administration,” “instruction in fertility awareness-based methods,” and “[c]ontraceptive care” to “include contraceptive counseling, initiation of contraceptive use, and follow-up care (for example, management, and evaluation as well as changes to

and removal or discontinuation of the contraceptive method).”<sup>75</sup>

To more explicitly state that the exemption encompasses any of the contraceptive or sterilization services, items, or information that have been required under the Guidelines, the Religious IFC included a definition at 45 CFR 147.131(f) and 147.132(c), 26 CFR 54.9815–2713A(e), and 29 CFR 2590.715–2713A(e). These rules finalize those definitions without change, but renumber them as 45 CFR 147.131(f) and 147.132(c), 26 CFR 54.9815–2713A(e), and 29 CFR 2590.715–2713A(e), respectively.

#### *Q. Severability*

The Departments finalize without change (except for certain paragraph redesignations), the severability clauses in the interim final rules, namely, at paragraph (g) of 26 CFR 54.9815–2713A, the redesignated paragraph (g) of 29 CFR 2590.715–2713A, and 45 CFR 147.132(d).

#### *R. Other Public Comments*

##### *1. Items Approved as Contraceptives But Used to Treat Existing Conditions*

Some commenters noted that some drugs included in the preventive services contraceptive Mandate can also be useful for treating certain existing health conditions, and that women use them for non-contraceptive purposes. Certain commenters urged the Departments to clarify that the final rules do not permit employers to exclude from coverage medically necessary prescription drugs used for non-preventive services. Some commenters suggested that religious objections to the Mandate should not be permitted in cases where such methods are used to treat such conditions, even if those methods can also be used for contraceptive purposes.

Section 2713(a)(4) only applies to “preventive” care and screenings. The statute does not allow the Guidelines to mandate coverage of services provided solely for a non-preventive use, such as the treatment of an existing condition. The Guidelines implementing this section of the statute are consistent with that narrow

<sup>75</sup><https://www.hrsa.gov/womens-guidelines-2016/index.html>.



authority. They state repeatedly that they apply to “preventive” services or care.<sup>76</sup> The requirement in the Guidelines concerning “contraception” specifies several times that it encompasses “contraceptives,” that is, medical products, methods, and services applied for “contraceptive” uses. The Guidelines do not require coverage of care and screenings that are non-preventive, and the contraception portion of those Guidelines do not require coverage of medical products, methods, care, and screenings that are non-contraceptive in purpose or use. The Guidelines’ inclusion of contraceptive services requires coverage of contraceptive methods as a type of preventive service only when a drug that FDA has approved for contraceptive use is prescribed in whole or in part for such purpose or intended use. Section 2713(a)(4) does not authorize the Departments to require coverage, without cost-sharing, of drugs prescribed exclusively for a non-contraceptive and non-preventive use to treat an existing condition.<sup>77</sup> The extent to which contraceptives are covered to treat non-preventive conditions would be determined by application of the requirement section 1302(b)(1)(F) of the ACA to cover prescription drugs (where applicable), implementing regulations at 45 CFR 156.122, and 156.125, and plans’ decisions about the basket of medicines to cover for these conditions.

Some commenters observed that pharmacy claims do not include a medical diagnosis code, so plans may be unable to discern whether a drug approved by FDA for contraceptive uses is actually applied for a preventive or contraceptive use, or for another use. Section 2713(a)(4), however, draws a distinction between preventive care and screenings and other kinds of care and screenings. That subsection does not authorize the Departments to impose a coverage mandate of services that are not at least partly applied for a preventive use, and the Guidelines them-

selves do not require coverage of contraceptive methods or care unless such methods or care is contraceptive in purpose. These rules do not prohibit issuers from covering drugs and devices that are approved for contraceptive uses even when those drugs and devices are prescribed for non-preventive, non-contraceptive purposes. As discussed above, these final rules also do not purport to delineate the items HRSA will include in the Guidelines, but only concern expanded exemptions and accommodations that apply to the extent the Guidelines require contraceptive coverage. Therefore, the Departments do not consider it appropriate to specify in these final rules that under section 2713(a)(4), exempt organizations must provide coverage for drugs prescribed exclusively for a non-contraceptive and non-preventive use to treat an existing condition.

## 2. Comments Concerning Regulatory Impact

Some commenters agreed with the Departments’ statement in the Religious IFC that the expanded exemptions are likely to affect only a small percentage of women otherwise receiving coverage under the Mandate. Other commenters disagreed, stating that the expanded exemptions could take contraceptive coverage away from many or most women. Still others opposed expanding the exemptions and contended that accurately determining the number of women affected by the expanded exemptions is not possible.

After reviewing the public comments, the Departments agree with commenters who said that estimating the impact of these final rules is difficult based on the limited data available to us, and with commenters who agreed with the Religious IFC that the expanded exemptions are likely to affect only a small percentage of women. The Departments do not find the estimates of large impacts submitted by

some commenters more reliable than the estimates set forth in the Religious and Moral IFCs. Even certain commenters that “strongly oppos[ed]” the Religious IFC commented that merely “thousands” would be impacted, a number consistent with the Departments’ estimate of the number of women who may be affected by the rule. The Departments’ estimates of the impact of these final rules are discussed in more detail in the following section. Therefore, the Departments conclude that the estimates of regulatory impact made in the Religious IFC are still the best estimates available. Our estimates are discussed in more detail in the following section.

## 3. Interaction with State Laws

Some commenters asked the Departments to discuss the interaction between these final rules and state laws that either require contraceptive coverage or provide religious exemptions from those and other requirements. Some commenters argued that providing expanded exemptions in these rules would negate state contraceptive requirements or narrower state religious exemptions. Some commenters asked that the Departments specify that these exemptions do not apply to plans governed by state laws that require contraceptive coverage. The Department agrees that these rules concern only the applicability of the Federal contraceptive Mandate imposed pursuant to section 2713(a)(4). They do not regulate state contraceptive mandates or state religious exemptions. If a plan is exempt under the Religious IFC and these rules, that exemption does not necessarily exempt the plan or other insurance issuer from state laws that may apply to it. The previous regulations, which offered exemptions for houses of worship and integrated auxiliaries, did not include regulatory language negating the exemptions in states that require contraceptive coverage, although

<sup>76</sup>*Id.*

<sup>77</sup>The Departments previously cited the IOM’s listing of existing conditions that contraceptive drugs can be used to treat (menstrual disorders, acne, and pelvic pain), and said of those uses that “there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy.” 77 FR 8727 & n.7. This was not, however, an assertion that PHS Act 2713(a)(4) or the Guidelines require coverage of “contraceptive” methods when prescribed for an exclusively non-contraceptive, non-preventive use. Instead, it was an observation that such drugs—generally referred to as “contraceptives”—also have some alternate beneficial uses to treat existing conditions. For the purposes of these final rules, the Departments clarify here that the reference prior to the Religious IFC to the benefits of using contraceptive drugs exclusively for some non-contraceptive and non-preventive uses to treat existing conditions did not mean that the Guidelines require coverage of such uses, and consequently is not a reason to refrain from offering the expanded exemptions provided here. Where a drug approved by the FDA for contraceptive use is prescribed for both a contraceptive use and a non-contraceptive use, the Guidelines (to the extent they apply) would require its coverage for contraceptive use. Where a drug approved by the FDA for contraceptive use is prescribed exclusively for a non-contraceptive and non-preventive use to treat an existing condition, it would be outside the scope of the Guidelines and the contraceptive Mandate.

the Departments discussed the issue to some degree in various preambles of those previous regulations. The Departments do not consider it appropriate or necessary in the regulatory text of the religious exemptions to declare that the Federal contraceptive Mandate will still apply in states that have a state contraceptive mandate, since these rules do not purport to regulate the applicability of state contraceptive mandates.<sup>78</sup>

Some commenters observed that, through ERISA, some entities may avoid state laws that require contraceptive coverage by self-insuring. This is a result of the application of the preemption and savings clauses contained in ERISA to state insurance regulation. *See* 29 U.S.C. 1144(a) & (b)(1). These rules cannot change statutory ERISA provisions, and do not change the standards applicable to ERISA preemption. To the extent Congress has decided that ERISA preemption includes preemption of state laws requiring contraceptive coverage, that decision occurred before the ACA and was not negated by the ACA. Congress did not mandate in the ACA that any Guidelines issued under section 2713(a)(4) must include contraceptives, nor that the Guidelines must force entities with religious objections to cover contraceptives.

#### **IV. Economic Impact and Paperwork Burden**

The Departments have examined the impacts of the Religious IFC and the final rules as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96 354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing

Regulation and Controlling Regulatory Costs (January 30, 2017).

#### *A. Executive Orders 12866 and 13563—Department of HHS and Department of Labor*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a regulation: (1) having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in any one year), and an “economically significant” regulatory action is subject to review by the Office of Management and Budget (OMB). As discussed below regarding their anticipated effects, the Religious IFC and these rules are not likely to have economic impacts of \$100 million or more in any one year, and therefore do not meet the definition of “economically significant” under Executive Order 12866. However, OMB has

determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order. Therefore, OMB has reviewed these final rules, and the Departments have provided the following assessment of their impact.

#### **1. Need for Regulatory Action**

These final rules adopt as final and further change the amendments made by the Religious IFC, which amended the Departments’ July 2015 final regulations. The Religious IFC and these final rules expand the exemption from the requirement to provide coverage for contraceptives and sterilization, established under the HRSA Guidelines, promulgated under section 2713(a)(4) of the PHS Act, section 715(a)(1) of ERISA, and section 9815(a)(1) of the Code, to include certain entities and individuals with objections to compliance with the Mandate based on sincerely held religious beliefs, and they revise the accommodation process to make it optional for eligible organizations. The expanded exemption applies to certain individuals and entities that have religious objections to some (or all) of the contraceptive and/or sterilization services that would be covered under the Guidelines. Such action has been taken, among other reasons discussed above, to provide for participation in the health insurance market by certain entities or individuals, by freeing them from penalties they could incur if they follow their sincerely held religious beliefs against contraceptive coverage.

#### **2. Anticipated Effects**

##### **a. Removal of burdens on religious exercise**

Regarding entities and individuals that are extended an exemption by the Religious IFC and these final rules, without that exemption the Guidelines would require many of them to either pay for coverage of contraceptive services that they find religiously objectionable; submit self-certifications that would result in their issuer or third party administrator paying for such services for their employees,

<sup>78</sup>Some commenters also asked that these final rules specify that exempt entities must comply with other applicable laws concerning such things as notice to plan participants or collective bargaining agreements. These final rules relieve the application of the Federal contraceptive Mandate under section 2713(a)(4) to qualified exempt entities; they do not affect the applicability of other laws. Elsewhere in this preamble, the Departments provide guidance applicable to notices of revocation and changes that an entity may seek to make during its plan year.

which some entities also believe entangles them in the provision of such objectionable coverage; or pay tax penalties, or be subject to other adverse consequences, for non-compliance with these requirements. These final rules remove certain associated burdens imposed on these entities and individuals—that is, by recognizing their religious objections to, and exempting them on the basis of such objections from, the contraceptive and/or sterilization coverage requirement of the HRSA Guidelines and making the accommodation process optional for eligible organizations.

#### b. Notices when revoking accommodated status

To the extent that entities choose to revoke their accommodated status to make use of the expanded exemption, a notice will need to be sent to enrollees (either by the objecting entity or by the issuer or third party administrator) that their contraceptive coverage is changing, and guidance will reflect that such a notice requirement is imposed no more than is already required by preexisting rules that require notices to be sent to enrollees of changes to coverage during a plan year. If the entities wait until the start of their next plan year to change to exempt status, instead of doing so during the current plan year, those entities generally will also be able to avoid sending any supplementary notices in addition to what they would otherwise normally send prior to the start of a new plan year. Additionally, these final rules provide such entities with an offsetting regulatory benefit by the exemption itself and its relief of burdens on their religious beliefs. As discussed below, assuming that more than half of the entities that have been using the previous accommodation will seek immediate revocation of their accommodated status and notices will be sent to all their enrollees, the total estimated cost of sending those notices will be \$302,036.

#### c. Impacts on third party administrators and issuers

The Departments estimate that these final rules will not result in any additional

burdens or costs on issuers or third party administrators. As discussed below, the Departments believe that 109 of the 209 entities making use of the accommodation process will instead make use of their new exempt status. In contrast, the Departments expect that a much smaller number (which we assume to be 9) will make use of the accommodation to which they were not previously provided access. Reduced burdens for issuers and third party administrators due to reductions in use of the accommodation will more than offset increased obligations for serving the fewer number of entities that will now opt into the accommodation. This will lead to a net decrease in burdens and costs on issuers and third party administrators, who will no longer have continuing obligations imposed on them by the accommodation. While these rules make it legal for issuers to offer insurance coverage that omits contraceptives to exempt entities and individuals, these final rules do not require issuers to do so.

The Departments anticipate that the effect of these rules on adjustments made to the federally facilitated Exchange user fees under 45 CFR 156.50 will be that fewer overall adjustments will be made using the accommodation process, because there will be more entities who previously were reluctant users of the accommodation that will choose to operate under the newly expanded exemption than there will be entities not previously eligible to use the accommodation that will opt into it. The Departments' estimates of each number of those entities is set forth in more detail below.

#### d. Impacts on persons covered by newly exempt plans

These final rules will result in some persons covered in plans of newly exempt entities not receiving coverage or payments for contraceptive services. As discussed in the Religious IFC, the Departments did not have sufficient data on a variety of relevant factors to precisely estimate how many women would be impacted by the expanded exemptions or any related costs they may incur for contraceptive coverage or the results as-

sociated with any unintended pregnancies.

#### i. Unknown factors concerning impact on persons in newly exempt plans

As referenced above and for reasons explained here, there are multiple levels of uncertainty involved in measuring the effect of the expanded exemption, including but not limited to—

- How many entities will make use of their newly exempt status.
- How many entities will opt into the accommodation maintained by these rules, under which their plan participants will continue receiving contraceptive coverage.
- Which contraceptive methods some newly exempt entities will continue to provide without cost-sharing despite the entity objecting to other methods (for example, as reflected in *Hobby Lobby*, several objecting entities have still provided coverage for 14 of the 18 FDA-approved women's contraceptive or sterilization methods, 134 S. Ct. at 2766).
- How many women will be covered by plans of entities using their newly exempt status.
- Which of the women covered by those plans want and would have used contraceptive coverage or payments for contraceptive methods that are no longer covered by such plans.
- Whether, given the broad availability of contraceptives and their relatively low cost, such women will obtain and use contraception even if it is not covered.
- The degree to which such women are in the category of women identified by IOM as most at risk of unintended pregnancy.
- The degree to which unintended pregnancies may result among those women, which would be attributable as an effect of these rules only if the women did not otherwise use contraception or a particular contraceptive method due to their plan making use of its newly exempt status.
- The degree to which such unintended pregnancies may be associated with negative health effects, or whether such effects may be offset by other



factors, such as the fact that those women will be otherwise enrolled in insurance coverage.

- The extent to which such women will qualify for alternative sources of contraceptive access, such as through a parent's or spouse's plan, or through one of the many governmental programs that subsidize contraceptive coverage to supplement their access.

## ii. Public comments concerning estimates in Religious IFC

In the public comments, some commenters agreed with the Departments' estimate that, at most, the economic impact would lead to a potential transfer cost, from employers (or other plan sponsors) to affected women, of \$63.8 million. Some commenters said the impact would be much smaller. Other commenters disagreed, suggesting that the expanded exemptions risked removing contraceptive coverage from more than 55 million women receiving the benefits of the preventive services Guidelines, or even risked removing contraceptive coverage from over 100 million women. Some commenters cited studies indicating that, nationally, unintended pregnancies have large public costs, and the Mandate overall led to large out-of-pocket savings for women.

These general comments do not, however, substantially assist us in estimating how many women would be affected by these expanded exemptions specifically, or among them, how many unintended pregnancies would result, or how many of the affected women would nevertheless use contraceptives not covered under the health plans of their objecting employers and, thus, be subject to the transfer costs the Departments estimate, or instead, how many women might avoid unintended pregnancies by changing their activities in other ways besides using contraceptives. The Departments conclude, therefore, that

our estimates of the anticipated effect in the Religious IFC are still the best estimates we have based on the limited data available to make those estimates. We do not believe that the higher estimates submitted by various public commenters sufficiently took into consideration, or analyzed, the various factors that suggest the small percentage of entities that will now use the expanded exemptions out of the large number of entities subject to the Mandate overall. Instead, the Departments agree with various public commenters providing comment and analysis that, for a variety of reasons, the best estimate of the impact of the expanded exemptions finalized in these rules is that most women receiving contraceptive coverage under the Mandate will not be affected. We agree with such commenters that the number of women covered by entities likely to make use of the expanded exemptions in these rules is likely to be very small in comparison to the overall number of women receiving contraceptive coverage as a result of the Mandate.

## iii. Possible sources of information for estimating impact

The Departments have access to the following general sources of information that are relevant to this issue, but these sources do not provide a full picture of the impact of these final rules. First, the regulations prior to the Religious IFC already exempted certain houses of worship and their integrated auxiliaries and, as explained elsewhere, effectively did not apply contraceptive coverage requirements to various entities in self-insured church plans. The effect of those previous exemptions or limitations are not included as effects of these rules, which leave those impacts in place. Second, in the Departments' previous regulations creating or expanding exemptions and the accommodation process we concluded that no sig-

nificant burden or costs would result. 76 FR 46625; 78 FR 39889. Third, some entities, including some for-profit entities, object to only some but not all contraceptives, and in some cases will cover 14 of 18 FDA-approved women's contraceptive and sterilization methods.<sup>79</sup> See *Hobby Lobby*, 134 S. Ct. at 2766. The effects of the expanded exemptions will be mitigated to that extent. No publicly traded for-profit entities sued challenging the Mandate, and the public comments did not reveal any that specifically would seek to use the expanded exemptions. Consequently, the Departments agree with the estimate from the Religious IFC that publicly traded companies would not likely make use of these expanded exemptions.

Fourth, HHS previously estimated that 209 entities would make use of the accommodation process. To arrive at this number, the Departments used, as a placeholder, the approximately 122 nonprofit entities that brought litigation challenging the accommodation process, and the approximately 87 closely held for-profit entities that filed suit challenging the Mandate in general. The Departments' records indicate, as noted in the Religious IFC, that approximately 63 entities affirmatively submitted notices to HHS to use the accommodation,<sup>80</sup> and approximately 60 plans took advantage of the contraceptive user fees adjustments, in the 2015 plan year, to obtain reimbursement for contraceptive service payments made for coverage of such services for women covered by self-insured plans that were accommodated. Overall, while recognizing the limited data available, the Departments assumed that, under an expanded exemption and accommodation, approximately 109 previously accommodated entities would use an expanded exemption, and about 100 would continue their accommodated status. We also estimated that another 9 entities would use the accommodation

<sup>79</sup>By reference to the FDA Birth Control Guide's list of 18 birth control methods for women and 2 for men, <https://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm517406.pdf>, Hobby Lobby and entities with similar beliefs were not willing to cover: IUD copper; IUD with progestin; emergency contraceptive (Levonorgestrel); and emergency contraceptive (Ulipristal Acetate). See 134 S. Ct. at 2765–66. Hobby Lobby was willing to cover: sterilization surgery for women; sterilization implant for women; implantable rod; shot/injection; oral contraceptives ("the Pill"—combined pill); oral contraceptives ("the Pill"—extended/continuous use/combined pill); oral contraceptives ("the Mini Pill"—progestin only); patch; vaginal contraceptive ring; diaphragm with spermicide; sponge with spermicide; cervical cap with spermicide; female condom; spermicide alone. *Id.* Among women using these 18 female contraceptive methods, 85 percent use the 14 methods that Hobby Lobby and entities with similar beliefs were willing to cover (22,446,000 out of 26,436,000), and "the pill and female sterilization have been the two most commonly used methods since 1982." See Guttmacher Institute, "Contraceptive Use in the United States" (Sept. 2016), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

<sup>80</sup>This includes some fully insured and some self-insured plans, but it does not include entities that may have used the accommodation by submitting an EBSA form 700 self-certification directly to their issuer or third party administrator. In addition, the Departments have deemed some other entities as being subject to the accommodation through their litigation filings, but that might not have led to contraceptive coverage being provided to persons covered in some of those plans, either because they are exempt as houses of worship or integrated auxiliaries, they are in self-insured church plans, or the Departments were not aware of their issuers or third party administrators so as to send them letters obligating them to provide such coverage.

where the entities were not previously eligible to do so.

These sources of information were outlined in the Religious IFC. Some commenters agreed with the Departments' estimates based on those sources, and while others disagreed, the Departments conclude that commenters did not provide information that allows us to make better estimates.

#### iv. Estimates based on litigating entities that may use expanded exemptions

Based on these and other factors, the Departments considered two approaches in the Religious IFC to estimate the number of women affected among entities using the expanded exemptions. First, following the use in previous regulations of litigating entities to estimate the effect of the exemption and accommodation, the Departments attempted to estimate the number of women covered by plans of litigating entities that could be affected by expanded exemptions. Based on papers filed in litigation, and public sources, the Departments estimated in the Religious IFC that approximately 8,700 women of childbearing age could have their contraception costs affected by plans of litigating entities using these expanded exemptions. The Departments believe that number is lower based upon the receipt, by many of those litigating entities, of permanent injunctions against the enforcement of section 2713(a)(4) to the extent it supports a contraceptive Mandate, which have been entered by federal district courts since the issuance of the Religious IFC.<sup>81</sup> As a result, these final rules will not affect whether such entities will

be subject to the contraceptive Mandate. Subtracting those entities from the total, the Departments estimate that the remaining litigating entities employ approximately 49,000 persons, male and female. The average percent of workers at firms offering health benefits that are actually covered by those benefits is 60 percent.<sup>82</sup> This amounts to approximately 29,000 employees covered under those plans. EBSA estimates that for each employee policyholder, there is approximately one dependent.<sup>83</sup> This amounts to approximately 58,000 covered persons. Census data indicate that women of childbearing age—that is, women aged 15 to 44—compose 20.2 percent of the general population.<sup>84</sup> Furthermore, approximately 43.6 percent of women of childbearing age use women's contraceptive methods covered by the Guidelines.<sup>85</sup> Therefore, the Departments estimate that approximately 5,200 women of childbearing age that use contraception covered by the Guidelines are covered by employer sponsored plans of entities that might be affected by these final rules. The Departments also estimate that, for the educational institutions that brought litigation challenges objecting to the Mandate as applied to student coverage that they arranged—where (1) the institutions were not exempt under the prior rule, (2) their student plans were not self-insured, and (3) they have not received permanent injunctions preventing the application of the previous regulations—such student plans likely covered approximately 2,600 students. Thus, the Departments estimate the female members of those plans is 2,600 women.<sup>86</sup> Assuming, as referenced above, that 43.6 percent of such women use contraception

covered by the Guidelines, the Departments estimate that 1,150 of those women would be affected by these final rules.

Together, this leads the Departments to estimate that approximately 6,400 women of childbearing age may have their contraception costs affected by plans of litigating entities using these expanded exemptions. As noted previously, the Departments do not have data indicating how many of those women agree with their employers' or educational institutions' opposition to contraception (so that fewer of them than the national average might actually use contraception). Nor do the Departments know how many would have alternative contraceptive access from a parent's or spouse's plan, or from federal, state, or local governmental programs, nor how many of those women would fall in the category of being most at risk of unintended pregnancy, nor how many of those entities would provide some contraception in their plans while only objecting to certain contraceptives.

#### v. Estimates of accommodated entities that may use expanded exemptions

In the Religious IFC, the Departments also examined data concerning user-fee reductions to estimate how many women might be affected by entities that are using the accommodation and would use the expanded exemptions under these final rules. Under the accommodation, HHS has received information from issuers that seek user fees adjustments under 45 CFR 156.50(d)(3)(ii), for providing contraceptive payments for self-insured plans that make use of the accommodation. HHS receives requests for fees adjustments

<sup>81</sup>See, for example, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240-R (W.D. Okla. order filed Mar. 7, 2018), and *Dordt Coll. v. Burwell*, No. 5:13-cv-04100 (N.D. Iowa order filed June 12, 2018).

<sup>82</sup>See Kaiser Family Foundation and Health Research and Educational Trust, "Employer Health Benefits: 2018 Annual Survey" at 62, available at <http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018>.

<sup>83</sup>Employee Benefits Security Administration, "Health Insurance Coverage Bulletin" Table 4, page 21. Using Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey. <https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2016.pdf>.

<sup>84</sup>United States Census Bureau, "Age and Sex Composition: 2010" (May 2011), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. The Guidelines' requirement of contraceptive coverage only applies "for all women with reproductive capacity." <https://www.hrsa.gov/womensguidelines/>; also, see 80 FR 40318. In addition, studies commonly consider the 15-44 age range to assess contraceptive use by women of childbearing age. See, for example, Guttmacher Institute, "Contraceptive Use in the United States" (Sept. 2016), available at <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

<sup>85</sup>See <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states> (reporting that of 61,491,766 women aged 15-44, 26,809,550 use women's contraceptive methods covered by the Guidelines).

<sup>86</sup>On average, the Departments expect that approximately half of those students (1,300) are female. For the purposes of this estimate, we also assume that female policyholders covered by plans arranged by institutions of higher education are women of childbearing age. The Departments expect that they would have less than the average number of dependents per policyholder than exists in standard plans, but for the purposes of providing an upper bound to this estimate, the Departments assume that they would have an average of one dependent per policyholder, thus bringing the number of policyholders and dependents back up to 2,600. Many of those dependents are likely not to be women of childbearing age, but in order to provide an upper bound to this estimate, the Departments assume they are. Therefore, for the purposes of this estimate, the Departments assume that the effect of these expanded exemptions on student plans of litigating entities includes 2,600 women.

both where Third Party Administrators (TPAs) for those self-insured accommodated plans are themselves issuers, and where the TPAs use separate issuers to provide the payments and those issuers seek fees adjustments. Where the issuers seeking adjustments are separate from the TPAs, the TPAs are asked to report the number of persons covered by those plans. Some users do not enter all the requested data, and not all the data for the 2017 plan year is complete. Nevertheless, HHS has reviewed the user fees adjustment data received for the 2017 plan year. HHS's best estimate from the data is that there were \$38.4 million in contraception claims sought as the basis for user fees adjustments for plans, and that these claims were for plans covering approximately 1,823,000 plan participants and beneficiaries of all ages, male and female.

This number fluctuates from year to year. It is larger than the estimate used in the Religious IFC because, on closer examination of the data, this number better accounts for plans where TPAs were also issuers seeking user fees adjustments, in addition to plans where the TPA is separate from the issuer seeking user fees adjustments. The number of employers using the accommodation where user fees adjustments were sought cannot be determined from HHS data, because not all users are required to submit that information, and HHS does not necessarily receive information about fully insured plans using the accommodation. Therefore, the Departments still consider our previous estimate of 209 entities using the accommodation as the best estimate available.

As noted in the Religious IFC, HHS's information indicates that religious nonprofit hospitals or health systems sponsored a significant minority of the accommodated self-insured plans that were using contraceptive user fees adjustments, yet those plans covered more than 80 per-

cent of the persons covered in all plans using contraceptive user fees adjustments. Some of those plans cover nearly tens of thousands of persons each and are proportionately much larger than the plans provided by other entities using the contraceptive user fees adjustments.

The Departments continue to believe that a significant fraction of the persons covered by previously accommodated plans provided by religious nonprofit hospitals or health systems may not be affected by the expanded exemption. A broad range of religious hospitals or health systems have publicly indicated that they do not conscientiously oppose participating in the accommodation.<sup>87</sup> Of course, some of these religious hospitals or health systems may opt for the expanded exemption under these final rules, but others might not. In addition, among plans of religious nonprofit hospitals or health systems, some have indicated that they might be eligible for status as a self-insured church plan.<sup>88</sup> As discussed above, some litigants challenging the Mandate have appeared, after their complaints were filed, to make use of self-insured church plan status.<sup>89</sup> (The Departments take no view on the status of these particular plans under the Employee Retirement Income Security Act of 1974 (ERISA), but simply make this observation for the purpose of seeking to estimate the impact of these final rules.) Nevertheless, considering all these factors, it generally seems likely that many of the remaining religious hospital or health systems plans previously using the accommodation will continue to opt into the voluntary accommodation under these final rules, under which their employees will still receive contraceptive coverage. To the extent that plans of religious hospitals or health systems are able to make use of self-insured church plan status, the previous accommodation rule would already have allowed them to relieve themselves and their third party administrators of obligations to

provide contraceptive coverage or payments. Therefore, in such situations, the Religious IFC and these final rules would not have an anticipated effect on the contraceptive coverage of women in those plans.

#### vi. Combined estimates of litigating and accommodated entities

Considering all these data points and limitations, the Departments offer the following estimate of the number of women who will be impacted by the expanded exemption in these final rules. In addition to the estimate of 6,400 women of child-bearing age that use contraception covered by the Guidelines, who will be affected by use of the expanded exemption among litigating entities, the Departments calculate the following number of women who we estimate to be affected by accommodated entities using the expanded exemption. As noted above, approximately 1,823,000 plan participants and beneficiaries were covered by self-insured plans that received contraceptive user fee adjustments in 2017. Although additional self-insured entities may have participated in the accommodation without making use of contraceptive user fees adjustments, the Departments do not know what number of entities did so. We consider it likely that self-insured entities with relatively larger numbers of covered persons had sufficient financial incentive to make use of the contraceptive user fees adjustments. Therefore, without better data available, the Departments assume that the number of persons covered by self-insured plans using contraceptive user fees adjustments approximates the number of persons covered by all self-insured plans using the accommodation.

An additional but unknown number of persons were likely covered in fully insured plans using the accommodation. The Departments do not have data on how many fully insured plans have been using

<sup>87</sup>See, e.g., <https://www.chausa.org/newsroom/women%27s-preventive-health-services-final-rule> ("HHS has now established an accommodation that will allow our ministries to continue offering health insurance plans for their employees as they have always done. . . . We are pleased that our members now have an accommodation that will not require them to contract, provide, pay or refer for contraceptive coverage. . . . We will work with our members to implement this accommodation.") In comments submitted in previous rules concerning this Mandate, the Catholic Health Association has stated it "is the national leadership organization for the Catholic health ministry, consisting of more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities, and related organizations. Our ministry is represented in all 50 states and the District of Columbia." Comments on CMS-9968-ANPRM (dated June 15, 2012).

<sup>88</sup>See, for example, Brief of the Catholic Health Association of the United States as Amicus Curiae in Support of Petitioners, Advocate Health Care Network, Nos. 16-74, 16-86, 16-258, 2017 WL 371934 at \*1 (U.S. filed Jan. 24, 2017) ("CHA members have relied for decades that the 'church plan' exemption contained in" ERISA.).

<sup>89</sup>See <https://www.franciscanhealth.org/sites/default/files/2015%20employee%20benefit%20booklet.pdf>; see, for example, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232, 242 (E.D.N.Y. 2013).



the accommodation, nor on how many persons were covered by those plans. DOL estimates that, among persons covered by employer-sponsored insurance in the private sector, 62.7 percent are covered by self-insured plans and 37.3 percent are covered by fully insured plans.<sup>90</sup> Therefore, corresponding to the approximately 1,823,000 persons covered by self-insured plans using user fee adjustments, we estimate an additional 1,084,000 persons were covered by fully insured plans using the accommodation. This yields approximately 2,907,000 persons of all ages and sexes whom the Departments estimate were covered in plans using the accommodation under the previous regulations.

Although recognizing the limited data available for our estimates, the Departments estimate that 100 of the 209 entities that were using the accommodation under the previous regulations will continue to opt into it under these final rules and that those entities will cover the substantial majority of persons previously covered in accommodated plans. The data concerning accommodated self-insured plans indicates that plans sponsored by religious hospitals and health systems and other entities likely to continue using the accommodation constitute over 60 percent of plans using the accommodation, and encompass more than 90 percent of the persons covered in accommodated plans.<sup>91</sup> In other words, plans sponsored by such entities appear to be a majority of plans using the accommodation, and also have a proportionately larger number of covered persons than do plans sponsored by other accommodated entities, which have smaller numbers of covered persons. Moreover, as cited above, many religious hospitals and health systems have indicated that they do not object to the accommodation, and some of those entities might also qualify as self-insured church plans, so that these final rules would not impact the contraceptive coverage their employees receive.

The Departments do not have specific data on which plans of which sizes will actually continue to opt into the accom-

modation, nor how many will make use of self-insured church plan status. The Departments assume that the proportions of covered persons in self-insured plans using contraceptive user fees adjustments also apply in fully insured plans, for which the Departments lack representative data. Based on these assumptions and without better data available, the Departments assume that the 100 accommodated entities that will remain in the accommodation will account for 75 percent of all the persons previously covered in accommodated plans. In comparison, the Departments assume the 109 accommodated entities that will make use of the expanded exemption will encompass 25 percent of persons previously covered in accommodated plans.

Applying these percentages to the estimated 2,907,000 persons covered in previously accommodated plans, the Departments estimate that approximately 727,000 persons will be covered in the 109 plans that use the expanded exemption, and 2,180,000 persons will be covered in the estimated 100 plans that continue to use the accommodation. According to the Census data cited above, women of childbearing age comprise 20.2 percent of the population, which means that approximately 147,000 women of childbearing age are covered in previously accommodated plans that the Departments estimate will use the expanded exemption. As noted above, approximately 43.6 percent of women of childbearing age use women's contraceptive methods covered by the Guidelines, so that the Departments expect approximately 64,000 women that use contraception covered by the Guidelines will be affected by accommodated entities using the expanded exemption.

It is not clear the extent to which this number overlaps with the number estimated above of 6,400 women in plans of litigating entities that may be affected by these rules. In order to more broadly estimate the possible effects of these rules, the Departments assume there is no overlap between the two numbers, and therefore that these final rules would affect

the contraceptive costs of approximately 70,500 women.

Under the assumptions just discussed, the number of women whose contraceptive costs will be impacted by the expanded exemption in these final rules is approximately 0.1 percent of the 55.6 million women in private plans that HHS's Office of the Assistant Secretary for Planning and Evaluation (ASPE) estimated in 2015 received preventive services coverage under the Guidelines.

In order to estimate the cost of contraception to women affected by the expanded exemption, the Departments are aware that, under the previous accommodation process, the total amount of contraceptive claims sought for self-insured plans for the 2017 benefit year was \$38.5 million.<sup>92</sup> These adjustments covered the cost of contraceptive coverage provided to women. As also discussed above, the Departments estimate that amount corresponded to plans covering 1,823,000 persons. Among those persons, as cited above, approximately 20.2 percent on average were women of childbearing age, and of those, approximately 43.6 percent use women's contraceptive methods covered by the Guidelines. This amounts to approximately 161,000 women. Therefore, entities using contraceptive user fees adjustments received approximately \$239 per year per woman of childbearing age that used contraception covered by the Guidelines and covered in their plans. But in the Religious IFC, we estimated that the average annual cost of contraception per woman per year is \$584. As noted above, public commenters cited similar estimates of the annual cost of various contraceptive methods, if calculated for the life of the method's effectiveness. Therefore, to estimate the annual transfer effects of these final rules, the Departments will continue to use the estimate of \$584 per woman per year. With an estimated impact of these final rules of 70,500 women per year, the financial transfer effects attributable to these final rules on those women would be approximately \$41.2 million.

<sup>90</sup>"Health Insurance Coverage Bulletin" Table 3A, page 14. Using Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey. <https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2016.pdf>.

<sup>91</sup>The data also reflects a religious university using the accommodation that has publicly affirmed the accommodation is consistent with its religious views, and two houses of worship that are using the accommodation despite already qualifying for the previous exemption. We assume for the purposes of this estimate these three entities will also continue using the accommodation instead of the expanded exemption.

<sup>92</sup>The amount of user fees adjustments provided was higher than this, since an additional administrative amount was added to the amount of contraceptive costs claimed.

Some commenters suggested that the Departments' estimate of women affected among litigating entities was too low, but they did not support their proposed higher numbers with citations or specific data that could be verified as more reliable than the estimates in the Religious IFC. Their estimates appeared to be overinclusive, for example, by counting all litigating entities and not just those that may be affected by these rules because they are not in church plans, or by counting all plan participants and not just women of child-bearing age that use contraception. Moreover, since the Religious IFC was issued, additional entities have received permanent injunctions against enforcement of any regulations implementing the contraceptive Mandate and so will not be affected by these final rules. Taking all of these factors into account, the Departments are not aware of a better method of estimating the number of women affected by these expanded exemptions.

vii. Alternate estimates based on consideration of pre-ACA plans

To account for uncertainty in the estimates above, the Departments conducted a second analysis using an alternative framework, in order to thoroughly consider the possible upper bound economic impact of these final rules.

In 2015, ASPE estimated that 55.6 million women aged 15 to 64 were covered by private insurance had preventive services coverage under the Affordable Care Act.<sup>93</sup> The Religious IFC used this estimate in this second analysis of the possible impact of the expanded exemptions in the interim final rules. ASPE has not issued an update to its report. Some commenters noted that a private organization published a fact sheet in 2017 claiming to make similar estimates based on more re-

cent data, in which it estimated that 62.4 million aged 15 to 64 were covered by private insurance had preventive services coverage under the Affordable Care Act.<sup>94</sup> The primary difference between these numbers appears to be a change in the number of persons covered by grandfathered plans.

The methodology of both reports do not fully correspond to the number the Departments seek to estimate here for the purposes of *Executive Orders 12866 and 13563*. These final rules will not affect all women aged 15 to 64 who are covered by private insurance and have coverage of preventive services under the Affordable Care Act. This is partly because the Departments do not have evidence to suggest that most employers will have sincerely held religious objections to contraceptive coverage and will use the expanded exemptions. In addition, both reports include women covered by plans that are not likely affected by the expanded exemptions for other reasons. For example, even though the estimates in those reports do not include enrollees in public plans such as Medicare or Medicaid, they do include enrollees in plans obtained on the health insurance marketplaces, purchased in the individual market, obtained by self-employed persons, or offered by government employers. Women who purchase plans in the marketplaces, the individual market, or as self-employed persons are not required to use the exemptions in these rules. Government employers are also not affected by the exemptions in these rules.

In response to public comments citing the more recent report, the Departments offer the following estimates based on more recent data than used in the Religious IFC. Data from the U.S. Census Bureau indicates that 167.6 million individuals, male and female, under 65 years

of age, were covered by employment-based insurance in 2017.<sup>95</sup> Of those, 50.1 percent were female, that is, 84 million.<sup>96</sup> The most recent Health Insurance Coverage Bulletin from EBSA states that, within employer-sponsored insurance, 76.5% are covered by private sector employers.<sup>97</sup> As noted above, these expanded exemptions do not apply to public sector employers. Assuming the same percentage applies to the Census data for 2017, 64.2 million women under 65 years of age were covered by private sector employment based insurance. EBSA's bulletin also states that, among those covered by private sector employer sponsored insurance, 5% receive health insurance coverage from a different primary source.<sup>98</sup> We assume for the purposes of this estimate that an exemption claimed by an employer under these rules need not affect contraceptive coverage of a person who receives health insurance coverage from a different primary source. Again assuming this percentage applies to the 2017 coverage year, we estimate that 61 million women under 65 years of age received primary health coverage from private sector, employment-based insurance. In conducting this analysis, the Departments also observed that for 3.8 percent of those covered by private sector employment sponsored insurance, the plan was purchased by a self-employed person, not by a third party employer. Self-employed persons who direct firms are not required to use the exemptions in these final rules, but if they do, they would not be losing contraceptive coverage that they want to have, since they would be using the exemption based on their sincerely held religious beliefs. If those persons have employees, the employees would be included in this estimate in the number of people who receive employer sponsored insurance from a third party. Assuming this percentage applies to the 2017 coverage year, we estimate that

<sup>93</sup> Available at <https://aspe.hhs.gov/system/files/pdf/139221/The%20Affordable%20Care%20Act%20is%20Improving%20Access%20to%20Preventive%20Services%20for%20Millions%20of%20Americans.pdf>.

<sup>94</sup> The commenters cited the National Women's Law Center's Fact Sheet from September 2017, available at <https://nwlclaw.com/wp-content/uploads/2017/09/New-Preventive-Services-Estimates-3.pdf>.

<sup>95</sup> See U.S. Census Bureau Current Population Survey Table HI-01, "Health Insurance Coverage in 2017: All Races," available at [https://www2.census.gov/programs-surveys/cps/tables/hi-01/2018/hi01\\_1.xls](https://www2.census.gov/programs-surveys/cps/tables/hi-01/2018/hi01_1.xls).

<sup>96</sup> *Id.*

<sup>97</sup> Table 1A, page 5 (stating that in coverage year 2015, 177.5 million persons of all ages were covered by employer sponsored insurance, with 135.7 million of those being covered by private sector employers), available at <https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2016.pdf>.

<sup>98</sup> *Id.* at Table 1C, page 8 (168.7 million persons received health insurance coverage from employer sponsored insurance as their primary source, compared to 177.5 million persons covered by employer sponsored insurance overall).

58.7 million women under 65 years of age received primary health coverage from private sector insurance from a third party employer plan sponsor.

The Kaiser Family Foundation's Employer Health Benefits Annual Survey 2018 states that 16% of covered workers at all firms are enrolled in a plan grandfathered under the ACA (and thus not subject to the preventive services coverage requirements), but that only 14% of workers receiving coverage from state and local government employer plans are in grandfathered plans.<sup>99</sup> Using the data cited above in EBSA's bulletin concerning the number of persons covered in public and private sector employer sponsored insurance, this suggests 16.6% of persons covered by private sector employer sponsored plans are in grandfathered plans, and 83.4% in non-grandfathered plans.<sup>100</sup> Applying this percentage to the Census data, 49 million women under 65 years of age received primary health insurance coverage from private sector, third party employment-based, non-grandfathered plans. Census data indicates that among women under age 65, 46.7% are of childbearing age (aged 15 to 44).<sup>101</sup> Therefore, we estimate that 22.9 million women aged 15–44 received primary health insurance coverage from private sector, third party employment based, non-grandfathered insurance plans.

Prior to the implementation of the Affordable Care Act, approximately 6 percent of employer survey respondents did not offer contraceptive coverage, with 31 percent of respondents not knowing whether they offered such coverage.<sup>102</sup>

The 6 percent may have included approximately 1.37 million of the women aged 15 to 44 primarily covered by employer-sponsored insurance plans in the private sector. And as noted above, approximately 43.6 percent of women of childbearing age use women's contraceptive methods covered by the Guidelines. Therefore, the Departments estimate that 599,000 women of childbearing age that use contraceptives covered by the Guidelines were covered by plans that omitted contraceptive coverage prior to the Affordable Care Act.<sup>103</sup>

It is unknown what motivated those employers to omit contraceptive coverage—whether they did so for religious or other reasons. Despite the lack of information about their motives, the Departments attempt to make a reasonable estimate of the upper bound of the number of those employers that omitted contraception before the Affordable Care Act and that would make use of these expanded exemptions based on sincerely held religious beliefs.

To begin, the Departments estimate that publicly traded companies would not likely make use of these expanded exemptions. Even though the rule does not preclude publicly traded companies from dropping coverage based on a sincerely held religious belief, it is likely that attempts to object on religious grounds by publicly traded companies would be rare. The Departments take note of the Supreme Court's decision in *Hobby Lobby*, where the Court observed that "HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights,

and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable." 134 S. Ct. at 2774. The Departments are aware of several federal health care conscience laws<sup>104</sup> that in some cases have existed for decades and that protect companies, including publicly traded companies, from discrimination if, for example, they decline to facilitate abortion, but the Departments are not aware of examples where publicly traded companies have made use of these exemptions. Thus, while the Departments consider it important to include publicly traded companies in the scope of these expanded exemptions for reasons similar to those reasons used by the Congress in RFRA and some health care conscience laws, in estimating the anticipated effects of the expanded exemptions, the Departments agree with the Supreme Court that it is improbable any will do so.

This assumption is significant because 31.3 percent of employees in the private sector work for publicly traded companies.<sup>105</sup> That means that only approximately 411,000 women aged 15 to 44 that use contraceptives covered by the Guidelines were covered by plans of non-publicly traded companies that did not provide contraceptive coverage pre-Affordable Care Act.

Moreover, because these final rules build on previous regulations that already exempted houses of worship and integrated auxiliaries and, as explained above,

<sup>99</sup>"Employer Health Benefits: 2018 Annual Survey" at 211, available at <http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018>.

<sup>100</sup>EBSA's bulletin shows 168.7 million persons with primary coverage from employer sponsored insurance, with 131.6 million in the private sector and 37.1 million in the public sector. 16% of 168.7 million is 26.9 million. 14% of 37.1 million is 5.2 million. 26.9 million - 5.2 million is 21.8 million, which is 16.6% of the 131.6 million persons with primary coverage from private sector employer sponsored insurance.

<sup>101</sup>U.S. Census Bureau, Table S0101 "Age and Sex" (available at [https://data.census.gov/cedsci/results/tables?q=S0101:%20AGE%20AND%20SEX&ps=table\\*currentPage@1](https://data.census.gov/cedsci/results/tables?q=S0101:%20AGE%20AND%20SEX&ps=table*currentPage@1)).

<sup>102</sup>Kaiser Family Foundation & Health Research & Educational Trust, "Employer Health Benefits, 2010 Annual Survey" at 196, available at <https://kaiserfamilyfoundation.files.wordpress.com/2013/04/8085.pdf>.

<sup>103</sup>Some of the 31 percent of survey respondents that did not know about contraceptive coverage may not have offered such coverage. If it were possible to account for this non-coverage, the estimate of potentially affected covered women could increase. On the other hand, these employers' lack of knowledge about contraceptive coverage suggests that they lacked sincerely held religious beliefs specifically objecting to such coverage—beliefs without which they would not qualify for the expanded exemptions offered by these final rules. In that case, omission of such employers and covered women from this estimation approach would be appropriate. Correspondingly, the 6 percent of employers that had direct knowledge about the absence of coverage may be more likely to have omitted such coverage on the basis of religious beliefs than were the 31 percent of survey respondents who did not know whether the coverage was offered. Yet an entity's mere knowledge about its coverage status does not itself reflect its motive for omitting coverage. In responding to the survey, the entity may have simply examined its plan document to determine whether or not contraceptive coverage was offered. As will be relevant in a later portion of the analysis, we have no data indicating what portion of the entities that omitted contraceptive coverage pre-Affordable Care Act did so on the basis of sincerely held religious beliefs, as opposed to doing so for other reasons that would not qualify them for the expanded exemption offered in these final rules.

<sup>104</sup>For example, 42 U.S.C. 300a-7(b), 42 U.S.C. 238n, and Consolidated Appropriations Act of 2017, Div. H, Title V, Sec. 507(d), Pub. L. No. 115-31.

<sup>105</sup>John Asker, et al., "Corporate Investment and Stock Market Listing: A Puzzle?" 28 *Review of Financial Studies* Issue 2, at 342–390 (Oct. 7, 2014), available at <https://doi.org/10.1093/rfs/hhu077>. This is true even though there are only about 4,300 publicly traded companies in the U.S. See Rayhanul Ibrahim, "The number of publicly-traded US companies is down 46% in the past two decades," *Yahoo! Finance* (Aug. 8, 2016), available at <https://finance.yahoo.com/news/jp-startup-public-companies-fewer-000000709.html>.



effectively eliminated obligations to provide contraceptive coverage within objecting self-insured church plans, the Departments attempt to estimate the number of such employers whose employees would not be affected by these rules. In attempting to estimate the number of such employers, the Departments consider the following information. Many Catholic dioceses have litigated or filed public comments opposing the Mandate, representing to the Departments and to courts around the country that official Catholic Church teaching opposes contraception. There are 17,651 Catholic parishes in the United States,<sup>106</sup> 197 Catholic dioceses,<sup>107</sup> 5,224 Catholic elementary schools, and 1,205 Catholic secondary schools.<sup>108</sup> Not all Catholic schools are integrated auxiliaries of Catholic churches, but there are other Catholic entities that are integrated auxiliaries that are not schools, so the Departments use the number of schools as an estimate of the number of integrated auxiliaries. Among self-insured church plans that oppose the Mandate, the Department has been sued by two—Guidestone and Christian Brothers. Guidestone is a plan organized by the Southern Baptist convention covering 38,000 employers, some of which are exempt as churches or integrated auxiliaries, and some of which are not.<sup>109</sup> Christian Brothers is a plan that covers Catholic organizations including Catholic churches and integrated auxiliaries, which are estimated above, but has also said in litigation that it covers about 500 additional entities that are not exempt as churches.<sup>110</sup> In total, therefore, without having certain data on the number of entities exempt under the previous rules, the Departments estimate that approximately 62,000 employers among houses of worship, integrated auxiliaries, and church plans, were exempt or relieved of contraceptive coverage obligations under the previous regulations. The Departments do not know how many persons are

covered in the plans of those employers. Guidestone reports that among its 38,000 employers, its plan covers approximately 220,000 persons, and its employers include “churches, mission-sending agencies, hospitals, educational institutions and other related ministries.” Using that ratio, the Departments estimate that the 62,000 church and church plan employers among Guidestone, Christian Brothers, and Catholic churches would include 359,000 persons. Among them, as referenced above, 72,500 women would be of childbearing age, and 32,100 may use contraceptives covered by the Guidelines.

Taking all of these factors into account, the Departments estimate that the private, non-publicly traded employers that did not cover contraception pre-Affordable Care Act, and that were not exempt by the previous regulations nor were participants in self-insured church plans that oppose contraceptive coverage, covered approximately 379,000 women aged 15 to 44 that use contraceptives covered by the Guidelines. But to estimate the likely actual transfer impact of these final rules, the Departments must estimate not just the number of such women covered by those entities, but how many of those entities would actually qualify for, and use, the expanded exemptions.

The Departments do not have data indicating how many of the entities that omitted coverage of contraception pre-Affordable Care Act did so on the basis of sincerely held religious beliefs that might qualify them for exempt status under these final rules, as opposed to having done so for other reasons. Besides the entities that filed lawsuits or submitted public comments concerning previous regulations on this matter, the Departments are not aware of entities that omitted contraception pre-Affordable Care Act and then opposed the contraceptive coverage requirement after it was imposed by the Guidelines. For the following reasons, however, the Depart-

ments believe that a reasonable estimate is that no more than approximately one third of the persons covered by relevant entities—that is, no more than approximately 126,400 affected women—would likely be subject to potential transfer impacts under the expanded religious exemptions offered in these final rules. Consequently, as explained below, the Departments believe that the potential impact of these final rules falls substantially below the \$100 million threshold for an economically significant major rule.

First, as mentioned, the Departments are not aware of information, or of data from public comments, that would lead us to estimate that all or most entities that omitted coverage of contraception pre-Affordable Care Act did so on the basis of sincerely held conscientious objections in general or, specifically, religious beliefs, as opposed to having done so for other reasons. It would seem reasonable to assume that many of those entities did not do so based on sincerely held religious beliefs. According to a 2016 poll, only 4% of Americans believe that using contraceptives is morally wrong (including from a religious perspective).<sup>111</sup> In addition, various reasons exist for some employers not to return to a pre-ACA situation in which they did not provide contraceptive coverage, such as avoiding negative publicity, the difficulty of taking away a fringe benefit that employees have become accustomed to having, and avoiding the administrative cost of renegotiating insurance contracts. Additionally, as discussed above, many employers with objections to contraception, including several of the largest litigants, only object to some contraceptives and cover as many as 14 of 18 of the contraceptive methods included in the Guidelines. This will reduce, and potentially eliminate, the contraceptive cost transfer for women covered in their

<sup>106</sup>Roman Catholic Diocese of Reno, “Diocese of Reno Directory: 2016-2017,” available at <http://www.renodiocese.org/documents/2016/9/2016%202017%20directory.pdf>.

<sup>107</sup>Wikipedia, “List of Catholic dioceses in the United States,” available at [https://en.wikipedia.org/wiki/List\\_of\\_Catholic\\_dioceses\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_Catholic_dioceses_in_the_United_States).

<sup>108</sup>National Catholic Educational Association, “Catholic School Data,” available at [http://www.ncea.org/NCEA/Proclaim/Catholic\\_School\\_Data/Catholic\\_School\\_Data.aspx](http://www.ncea.org/NCEA/Proclaim/Catholic_School_Data/Catholic_School_Data.aspx).

<sup>109</sup>Guidestone Financial Resources, “Who We Serve,” available at <https://www.guidestone.org/AboutUs/WhoWeServe>.

<sup>110</sup>The Departments take no view on the status of particular plans under the Employee Retirement Income Security Act of 1974 (ERISA), but simply make this observation for the purpose of seeking to estimate the impact of these final rules.

<sup>111</sup>Pew Research Center, “Where the Public Stands on Religious Liberty vs. Nondiscrimination” at page 26 (Sept. 28, 2016), available at <http://assets.pewresearch.org/wp-content/uploads/sites/11/2016/09/Religious-Liberty-full-for-web.pdf>.

plans.<sup>112</sup> Moreover, as suggested by the Guidestone data mentioned previously, employers with conscientious objections may tend to have relatively few employees and, among nonprofit entities that object to the Mandate, it is possible that a greater share of their employees oppose contraception than among the general population, which should lead to a reduction in the estimate of how many women in those plans actually use contraception.

It may not be the case that all entities that objected on religious grounds to contraceptive coverage before the ACA brought suit against the Mandate. However, it is worth noting that, while less than 100 for-profit entities challenged the Mandate in court (and an unknown number joined two newly formed associational organizations bringing suit on their behalf), there are more than 3 million for-profit private sector establishments in the United States that offer health insurance.<sup>113</sup> Six percent of those would be 185,000, and one third of that number would be 62,000. The Departments consider it unlikely that tens or hundreds of thousands of for-profit private sector establishments omitted contraceptive coverage pre-ACA specifically because of sincerely held religious beliefs, when, after six years of litigation and multiple public comment periods, the Departments are aware of less than 100 such entities. The Departments do not know how many additional nonprofit entities would use the expanded exemptions, but as noted above, under the rules predating the Religious IFC, tens of thousands were already exempt as churches or integrated auxiliaries, or were covered by self-insured church plans that are not penalized if no contraceptive coverage is offered.

Finally, among entities that omitted contraceptive coverage based on sincerely held conscientious objections as opposed

to other reasons, it is likely that some, albeit a minority, did so based on moral objections that are non-religious, and therefore would not be compassed by the expanded exemptions in these final rules.<sup>114</sup> Among the general public, polls vary about religious beliefs, but one prominent poll shows that 13 percent of Americans say they do not believe in God or have no opinion on the question.<sup>115</sup> Therefore, the Departments estimate that, of the entities that omitted contraception pre-Affordable Care Act based on sincerely held conscientious objections as opposed to other reasons, a small fraction did so based on sincerely held non-religious moral convictions, and therefore would not be affected by the expanded exemption provided by these final rules for religious beliefs.

For the reasons stated above, the Departments believe it would be incorrect to assume that all or even most of the plans that did not cover contraceptives before the ACA did so on the basis of religious objections. Instead, without data available on the reasons those plans omitted contraceptive coverage before the ACA, we assume that no more than one third of those plans omitted contraceptive coverage based on sincerely held religious beliefs. Thus, of the estimated 379,000 women aged 15 to 44 that use contraceptives covered by the Guidelines, who received primary coverage from plans of private, non-publicly traded, third party employers that did not cover contraception pre-Affordable Care Act, and whose plans were neither exempt nor omitted from mandatory contraceptive coverage under the previous regulations, we estimate that no more than 126,400 women would be in plans that will use these expanded exemptions.

viii. Final estimates of persons affected by expanded exemptions

Based on the estimate of an average annual expenditure on contraceptive products and services of \$584 per user, the effect of the expanded exemptions on 126,400 women would give rise to approximately \$73.8 million in potential transfer impact. It is possible, however, that premiums would adjust to reflect changes in coverage, thus partially offsetting the transfer experienced by women who use the affected contraceptives. As referenced elsewhere in this analysis, such women may make up approximately 8.8 percent of the covered population,<sup>116</sup> in which case the offset would also be approximately 8.8 percent, yielding a potential transfer of \$67.3 million.

Thus, in their most expansive estimate, the Departments conclude that no more than approximately 126,400 women would likely be subject to potential transfer impacts under the expanded religious exemptions offered in these final rules. The Departments estimate this financial transfer to be approximately \$67.3 million. This falls substantially below the \$100 million threshold for an economically significant and major rule.

As noted above, the Departments view this alternative estimate as being the highest possible bound of the transfer effects of these rules, but believe the number of establishments that will actually exempt their plans as the result of these rules will be far fewer than contemplated by this estimate. The Departments make these estimates only for the purposes of determining whether the rules are economically significant under Executive Orders 12866 and 13563.

After reviewing public comments, both those supporting and those disagreeing with these estimates and similar estimates

<sup>112</sup>On the other hand, a key input in the approach that generated the one third threshold estimate was a survey indicating that six percent of employers did not provide contraceptive coverage pre-Affordable Care Act. Employers that covered some contraceptives pre-Affordable Care Act may have answered “yes” or “don’t know” to the survey. In such cases, the potential transfer estimate has a tendency toward underestimation because the rule’s effects on such women—causing their contraceptive coverage to be reduced from all 18 methods to some smaller subset—have been omitted from the calculation.

<sup>113</sup>Tables I.A.1 and I.A.2, Medical Expenditure Panel Survey, “Private-Sector Data by Firm Size, Industry Group, Ownership, Age of Firm, and Other Characteristics: 2017,” HHS Agency for Healthcare Research and Quality (indicating total number of for-profit incorporated, for-profit unincorporated, and non-profit establishments in the United States, and the percentage of each that offer health insurance), available at [https://meps.ahrq.gov/data\\_stats/summ\\_tables/insr/national/series\\_1/2017/tia1.htm](https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_1/2017/tia1.htm) and [https://meps.ahrq.gov/data\\_stats/summ\\_tables/insr/national/series\\_1/2017/tia2.htm](https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_1/2017/tia2.htm). 2523

<sup>114</sup>Such objections may be encompassed by companion final rules published elsewhere in today’s **Federal Register**. Those final rules, however, are narrower in scope than these final rules. For example, in providing expanded exemptions for plan sponsors, they do not encompass companies with certain publicly traded ownership interests.

<sup>115</sup>Gallup, “Religion,” available at <https://news.gallup.com/poll/1690/religion.aspx>.

<sup>116</sup>As cited above, women of childbearing age are 20.2 percent of woman aged 15–65, and 43.6 percent of women of childbearing age use contraceptives covered by the Guidelines.

from the Religious IFC, and because the Departments do not have sufficient data to precisely estimate the amount by which these factors render our estimate too high, or too low, the Departments simply conclude that the financial transfer falls substantially below the \$100 million threshold for an economically significant rule based on the calculations set forth above.

*B. Special Analyses—Department of the Treasury*

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the APA (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. The Religious IFC was an interim final rule with comment period, and in these final rules, the Departments adopt the Religious IFC as final with certain changes. These final rules are, thus, being issued after a notice and comment period.

The Departments also carefully considered the likely impact of the rule on small entities in connection with their assessment under Executive Order 12866 and do

not expect that these final rules will have a significant economic effect on a substantial number of small entities. These final rules will not result in any additional costs to affected entities, and, in many cases, may relieve burdens and costs from such entities. By exempting from the Mandate small businesses and nonprofit organizations with religious objections to some (or all) contraceptives and/or sterilization—businesses and organizations that would otherwise be faced with the dilemma of complying with the Mandate (and violating their religious beliefs) or following their beliefs (and incurring potentially significant financial penalties for noncompliance)—the Departments have reduced regulatory burden on such small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

*D. Paperwork Reduction Act—Department of Health and Human Services*

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995

(PRA) requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.

Recommendations to minimize the information collection burden on the affected public, including automated collection techniques. In the October 13, 2017 (82 FR 47792) interim final rules, we solicited public comment on each of these issues for the following sections of the rule containing information collection requirements (ICRs). A description of the information collection provisions implicated in these final rules is given in the following section with an estimate of the annual burden. The burden related to these ICRs received emergency review and approval under OMB control number 0938-1344. They have been resubmitted to OMB in conjunction with these final rules and are pending re-approval. The Departments sought public comments on PRA estimates set forth in the Religious IFC, and are not aware of significant comments submitted that suggest there is a better way to estimate these burdens.

1. Wage Data

Average labor costs (including 100 percent fringe benefits and overhead) used to estimate the costs are calculated using data available derived from the Bureau of Labor Statistics.<sup>117</sup>

BLS Occupation Title	Occupational Code	Mean Hourly Wage (\$/hr)	Fringe Benefits and Overhead (\$/hr)	Adjusted Hourly Wage (\$/hr)
Executive Secretaries and Executive Administrative Assistants	43-6011	\$27.84	\$27.84	\$55.68
Compensation and Benefits Manager	11-3111	\$61.01	\$61.01	\$122.02
Legal Counsel	23-1011	\$67.25	\$67.25	\$134.50
Senior Executive	11-1011	\$93.44	\$93.44	\$186.88
General and Operations Managers	11-1021	\$58.70	\$58.70	\$117.40

<sup>117</sup>May 2016 National Occupational Employment and Wage Estimates United States found at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm).



## 2. ICRs Regarding Self-Certification or Notices to HHS (§ 147.131(c)(3))

Each organization seeking to be treated as an eligible organization that wishes to use the optional accommodation process offered under these final rules must either use the EBSA Form 700 method of self-certification or provide notice to HHS of its religious objection to coverage of all or a subset of contraceptive services. Specifically, these final rules continue to allow eligible organizations to notify an issuer or third party administrator using EBSA Form 700, or to notify HHS, of their religious objection to coverage of all or a subset of contraceptive services, as set forth in the July 2015 final regulations (80 FR 41318).

Notably, however, entities that are participating in the previous accommodation process, where a self-certification or notice has already been submitted, and where the entities choose to continue their accommodated status under these final rules, generally do not need to file a new self-certification or notice (unless they change their issuer or third party administrator). As explained above, HHS assumes that, among the 209 entities the Departments estimated are using the previous accommodation, 109 will use the expanded exemption and 100 will continue under the voluntary accommodation. Those 100 entities will not need to file additional self-certifications or notices. HHS also assumes that an additional 9 entities that were not using the previous accommodation will opt into it. Those entities will be subject to the self-certification or notice requirement.

In order to estimate the cost for an entity that chooses to opt into the accommodation process, HHS assumes that clerical staff for each eligible organization will gather and enter the necessary information and send the self-certification to the issuer or third party administrator as appropriate, or send the notice to HHS.<sup>118</sup> HHS assumes that a compensation and benefits manager and inside legal counsel will review the self-certification or notice to HHS and a senior executive would execute it. HHS estimates that an eligible organization would spend approximately

50 minutes (30 minutes of clerical labor at a cost of \$55.68 per hour, 10 minutes for a compensation and benefits manager at a cost of \$122.02 per hour, 5 minutes for legal counsel at a cost of \$134.50 per hour, and 5 minutes by a senior executive at a cost of \$186.88 per hour) preparing and sending the self-certification or notice to HHS and filing it to meet the record-keeping requirement. Therefore, the total annual burden for preparing and providing the information in the self-certification or notice to HHS will require approximately 50 minutes for each eligible organization with an equivalent cost of approximately \$74.96 for a total hour burden of approximately 7.5 hours and an associated equivalent cost of approximately \$675 for 9 entities. As DOL and HHS share jurisdiction, they are splitting the hour burden so that each will account for approximately 3.75 burden hours with an equivalent cost of approximately \$337.

HHS estimates that each self-certification or notice to HHS will require \$0.50 in postage and \$0.05 in materials cost (paper and ink) and the total postage and materials cost for each self-certification or notice sent via mail will be \$0.55. For purposes of this analysis, HHS assumes that 50 percent of self-certifications or notices to HHS will be mailed. The total cost for sending the self-certifications or notices to HHS by mail is approximately \$2.75 for 5 entities. As DOL and HHS share jurisdiction they are splitting the cost burden so that each will account for \$1.38 of the cost burden.

## 3. ICRs Regarding Notice of Availability of Separate Payments for Contraceptive Services (§ 147.131(e))

As required by the July 2015 final regulations (80 FR 41318), a health insurance issuer or third party administrator providing or arranging separate payments for contraceptive services for participants and beneficiaries in insured or self-insured group health plans (or student enrollees and covered dependents in student health insurance coverage) of eligible organizations is required to provide a written notice to plan participants and beneficiaries (or student enrollees and covered dependents) informing them of the availability of such payments. The notice must be

separate from, but contemporaneous with (to the extent possible), any application materials distributed in connection with enrollment (or re-enrollment) in group or student coverage of the eligible organization in any plan year to which the accommodation is to apply and will be provided annually. To satisfy the notice requirement, issuers and third party administrators may, but are not required to, use the model language previously provided by HHS or substantially similar language.

As mentioned, HHS is anticipating that approximately 109 entities will use the optional accommodation (100 that used it previously, and 9 that will newly opt into it). It is unknown how many issuers or third party administrators provide health insurance coverage or services in connection with health plans of eligible organizations, but HHS will assume at least 109. It is estimated that each issuer or third party administrator will need approximately 1 hour of clerical labor (at \$55.68 per hour) and 15 minutes of management review (at \$117.40 per hour) to prepare the notices. The total burden for each issuer or third party administrator to prepare notices will be 1.25 hours with an associated cost of approximately \$85.03. The total burden for all 109 issuers or third party administrators will be 136 hours, with an associated cost of approximately \$9,268. As DOL and HHS share jurisdiction, they are splitting the burden each will account for 68 burden hours with an associated cost of \$4,634, with approximately 55 respondents.

The Departments estimate that approximately 2,180,000 plan participants and beneficiaries will be covered in the plans of the 100 entities that previously used the accommodation and will continue doing so, and that an additional 9 entities will newly opt into the accommodation. We reach this estimate using calculations set forth above, in which we used 2017 data available to HHS for contraceptive user fees adjustments to estimate that approximately 2,907,000 plan participants and beneficiaries were covered by plans using the accommodation. We further estimated that the 100 entities that previously used the accommodation and will continue doing so will cover approximately 75 per-

<sup>118</sup>For purposes of this analysis, the Department assumes that the same amount of time will be required to prepare the self-certification and the notice to HHS.

cent of the persons in all accommodated plans, based on HHS data concerning accommodated self-insured plans that indicates plans sponsored by religious hospitals and health systems encompass more than 80 percent of the persons covered in such plans. In other words, plans sponsored by such entities have a proportionately larger number of covered persons than do plans sponsored by other accommodated entities, which have smaller numbers of covered persons. As noted above, many religious hospitals and health systems have indicated that they do not object to the accommodation, and some of those entities might also qualify as self-insured church plans. The Departments do not have specific data on which plans of which employer sizes will actually continue to opt into the accommodation, nor how many will make use of self-insured church plan status. The Departments assume that the proportions of covered persons in self-insured plans using contraceptive user fees adjustments also apply in fully insured plans, for which we lack representative data.

Based on these assumptions and without better data available, the Departments estimate that previously accommodated entities encompassed approximately 2,907,000 persons; the estimated 100 entities that previously used the accommodation and continue to use it will account for 75 percent of those persons (that is, approximately 2,180,000 persons); and the estimated 109 entities that previously used the accommodation and will now use their exempt status will account for 25 percent of those persons (that is, approximately 727,000 persons). It is not known how many persons will be covered in the plans of the 9 entities we estimate will newly use the accommodation. Assuming that those 9 entities will have a similar number of covered persons per entity as the 100 entities encompassing 2,180,000 persons,

the Departments estimate that all 109 accommodated entities will encompass approximately 2,376,000 covered persons.

The Departments assume that sending one notice to each policyholder will satisfy the need to send the notices to all participants and dependents. Among persons covered by insurance plans sponsored by large employers in the private sector, approximately 50.1 percent are participants and 49.9 percent are dependents.<sup>119</sup> For 109 entities, the total number of notices will be 1,190,613. For purposes of this analysis, the Departments also assume that 53.7 percent of notices will be sent electronically, and 46.3 percent will be mailed.<sup>120</sup> Therefore, approximately 551,254 notices will be mailed. HHS estimates that each notice will require \$0.50 in postage and \$0.05 in materials cost (paper and ink) and the total postage and materials cost for each notice sent via mail will be \$0.55. The total cost for sending approximately 551,254 notices by mail will be approximately \$303,190. As DOL and HHS share jurisdiction, they are splitting the cost burden so each will account for \$151,595 of the cost burden.

#### 4. ICRs Regarding Notice of Revocation of Accommodation (§ 147.131(c)(4))

An eligible organization that now wishes to take advantage of the expanded exemption may revoke its use of the accommodation process; its issuer or third party administrator must provide written notice of such revocation to participants and beneficiaries as soon as practicable. As discussed above, HHS estimates that 109 entities that are using the accommodation process will revoke their use of the accommodation, and will therefore be required to send the notification; the issuer or third party administrator can send the notice on behalf of the entity. For the

purpose of calculating the ICRs associated with revocations of the accommodation, and for various reasons discussed above, HHS assumes that litigating entities that were previously using the accommodation and that will revoke their use of the accommodation fall within the estimated 109 entities that will revoke the accommodation overall.

As before, HHS assumes that, for each issuer or third party administrator, a manager and inside legal counsel and clerical staff will need approximately 2 hours to prepare and send the notification to participants and beneficiaries and maintain records (30 minutes for a manager at a cost of \$117.40 per hour, 30 minutes for legal counsel at a cost of \$134.50 per hour, 1 hour for clerical staff at a cost of \$55.68 per hour). The burden per respondent will be 2 hours with an associated cost of approximately \$182; for 109 entities, the total hour burden will be 218 hours with an associated cost of approximately \$19,798. As DOL and HHS share jurisdiction, they are splitting the hour burden so each will account for 109 burden hours with an associated cost of approximately \$9,899.

As discussed above, HHS estimates that there are approximately 727,000 covered persons in accommodated plans that will revoke their accommodated status and use the expanded exemption.<sup>121</sup> As before, the Departments use the average of 50.1 percent of covered persons who are policyholders, and estimate that an average of 53.7 percent of notices will be sent electronically and 46.3 percent by mail. Therefore, approximately 364,102 notices will be distributed, of which 168,579 notices will be mailed. HHS estimates that each mailed notice will require \$0.50 in postage and \$0.05 in materials cost (paper and ink) and the total postage and materials cost for each notice

<sup>119</sup>“Health Insurance Coverage Bulletin” Table 4, page 21. Using Data for the March 2016 Annual Social and Economic Supplement to the Current Population Survey. <https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2016.pdf>.

<sup>120</sup>According to data from the National Telecommunications and Information Agency (NTIA), 36.0 percent of individuals age 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt out that are automatically enrolled (for a total of 30.2 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 38.5 percent of individuals age 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61 percent of internet users use online banking, which is used as the proxy for the number of internet users who will opt in for electronic disclosure (for a total of 23.5 percent receiving electronic disclosure outside of work). Combining the 30.2 percent who receive electronic disclosure at work with the 23.5 percent who receive electronic disclosure outside of work produces a total of 53.7 percent who will receive electronic disclosure overall.

<sup>121</sup>In estimating the number of women that might have their contraceptive coverage affected by the expanded exemption, the Departments indicated that we do not know the extent to which the number of women in accommodated plans affected by these final rules overlap with the number of women in plans offered by litigating entities that will be affected by these final rules, though we assume there is significant overlap. That uncertainty should not affect the calculation of the ICRs for revocation notices, however. If the two numbers overlap, the estimates of plans revoking the accommodation and policyholders covered in those plans would already include plans and policyholders of litigating entities. If the numbers do not overlap, those litigating entity plans would not presently be enrolled in the accommodation, and therefore would not need to send notices concerning revocation of accommodated status.

sent via mail will be \$0.55. The total cost for sending approximately 168,579 notices by mail is approximately \$93,545.

As DOL and HHS share jurisdiction, they are splitting the hour burden so each will

account for 182,051 notices, with an associated cost of approximately \$46,772.

**Table 1: Summary of Information Collection Burdens**

Regulation Section	OMB Control Number	Number of Respondents	Responses	Burden per Respondent (hours)	Total Annual Burden (hours)	Hourly Labor Cost of Reporting (\$)	Total Labor Cost of Reporting (\$)	Total Cost (\$)
Self-Certification or Notices to HHS	0938-1344	5*	5	0.83	3.75	\$89.95	\$337	\$339
Notice of Availability of Separate Payments for Contraceptive Services	0938-1344	55*	595,307	1.25	68.13	\$68.02	\$4,634	\$156,229
Notice of Revocation of Accommodation	0938-1344	55*	182,051	2.00	109	\$90.82	\$9,899	\$56,671
Total		115*	777,363		180.88		\$14,870	\$213,239

\*The total number of respondents is 227 (= 9+109+109) for both HHS and DOL, but the summaries here and below exceed that total because of rounding up that occurs when sharing the burden between HHS and DOL.

Note: There are no capital/maintenance costs associated with the ICRs contained in this rule; therefore, we have removed the associated column from Table 1. Postage and material costs are included in Total Cost.

#### 5. Submission of PRA-Related Comments

We have submitted a copy of this rule to OMB for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by OMB.

#### E. Paperwork Reduction Act—Department of Labor

Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. In accordance with the requirements of the PRA, the ICR for the EBSA Form 700 and alternative notice have previously been approved by OMB under control numbers 1210-0150 and 1210-0152. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>. PRA ADDRESSEE: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N-5718, Washington, DC 20210. Telephone: 202-693-8410; Fax: 202-219-4745. These are not toll-free numbers.

The Religious final rules amended the ICR by changing the accommodation process to an optional process for exempt organizations and requiring a notice of revocation to be sent by the issuer or third party administrator to participants and beneficiaries in plans whose employer revokes their accommodation; these final rules confirm as final the Religious IFC provisions on the accommodation process. DOL submitted the ICRs to OMB in order to obtain OMB approval under the PRA for the regulatory revision. In an effort to consolidate the number of information collection requests, DOL is combining the ICR related to the OMB control number 1210-0152 with the ICR related to the OMB control number 1210-0150 and discontinuing OMB control number 1210-0152. Consistent with the analysis in the HHS PRA section above, the Departments expect that each of the estimated 9 eligible organizations newly opting into the accommodation will spend approximately 50 minutes in preparation time and incur \$0.54 mailing cost to self-certify or notify HHS. Each of the 109 issuers or third party administrators for the 109 eligible organizations that make use of the accommodation overall will distribute Notices of Availability of Separate Payments for Contraceptive Services. These issuers and third party administrators will spend ap-

proximately 1.25 hours in preparation time and incur \$0.54 cost per mailed notice. Notices of Availability of Separate Payments for Contraceptive Services will need to be sent to 1,190,613 policyholders, and 53.7 percent of the notices will be sent electronically, while 46.3 percent will be mailed. Finally, 109 entities using the previous accommodation process will revoke their use of the accommodation (in favor of the expanded exemption) and will therefore be required to cause the Notice of Revocation of Accommodation to be sent, with the issuer or third party administrator able to send the notice on behalf of the entity. These entities will spend approximately two hours in preparation time and incur \$0.54 cost per mailed notice. Notice of Revocation of Accommodation will need to be sent to an average of 364,102 policyholders and 53.7 percent of the notices will be sent electronically. The DOL information collections in this rule are found in 29 CFR 2510.3-16 and 2590.715-2713A and are summarized as follows:

Type of Review: Revised Collection.  
Agency: DOL-EBSA.

Title: Coverage of Certain Preventive Services under the Affordable Care Act—Private Sector.

OMB Numbers: 1210-0150.



Affected Public: Private Sector—Not for profit and religious organizations; businesses or other for-profits.

Total Respondents: 114<sup>122</sup> (combined with HHS total is 227).

Total Responses: 777,362 (combined with HHS total is 1,554,724).

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours: 181 (combined with HHS total is 362 hours). Estimated Total Annual Burden Cost: \$197,955 (combined with HHS total is \$395,911).

Type of Review: Revised Collection.

Agency: DOL–EBSA.

#### *F. Regulatory Reform Executive Orders 13765, 13771 and 13777*

Executive Order 13765 (January 20, 2017) directs that, “[t]o the maximum extent permitted by law, the Secretary of the Department of Health and Human Services and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any state or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.” In addition, agencies are directed to “take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the [Affordable Care Act], and prepare to afford the states more flexibility and control to create a freer and open healthcare market.” These final rules exercise the discretion provided to the Departments under the Affordable Care Act, RFRA, and other laws to grant exemptions and thereby minimize regulatory burdens of the Af-

fordable Care Act on the affected entities and recipients of health care services.

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), the Departments have estimated the costs and cost savings attributable to these final rules. As discussed in more detail in the preceding analysis, these final rules lessen incremental reporting costs.<sup>123</sup> However, in order to avoid double-counting with the Religious IFC, which has already been tallied as an Executive Order 13771 deregulatory action, this finalization of the IFC’s policy is not considered a deregulatory action under the Executive Order.

#### *G. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (section 202(a) of Pub. L. 104–4), requires the Departments to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year.” In 2018, that threshold after adjustment for inflation is \$150 million. For purposes of the Unfunded Mandates Reform Act, the Religious IFC and these final rules do not include any federal mandate that may result in expenditures by state, local, or tribal governments, nor do they include any federal mandates that may impose an annual burden of \$150 million, adjusted for inflation, or more on the private sector.

#### *H. Federalism*

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have “substantial direct effects”

on states, the relationship between the federal government and states, or the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the regulation.

These final rules do not have any federalism implications, since they only provide exemptions from the contraceptive and sterilization coverage requirement in HRSA Guidelines supplied under section 2713 of the PHS Act.

#### **V. Statutory Authority**

The Department of the Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code, and Pub. L. 103–141, 107 Stat. 1488 (42 U.S.C. 2000bb–2000bb–4)..

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1002(16), 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Pub. L. 103–141, 107 Stat. 1488 (42 U.S.C. 2000bb–2000bb–4); Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

The Department of Health and Human Services regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended; and Title I of the Affordable Care Act, sections 1301–1304, 1311–1312, 1321–1322, 1324, 1334, 1342–1343, 1401–

<sup>122</sup>Denotes that there is an overlap between jurisdiction shared by HHS and DOL over these respondents and therefore they are included only once in the total.

<sup>123</sup>Other noteworthy potential impacts encompass potential changes in medical expenditures, including potential decreased expenditures on contraceptive devices and drugs and potential increased expenditures on pregnancy-related medical services. OMB’s guidance on EO 13771 implementation (Dominic J. Mancini, “Guidance Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs,” Office of Mgmt. & Budget (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>) states that impacts should be categorized as consistently as possible within Departments. The Food and Drug Administration, within HHS, and the Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA), within DOL, regularly estimate medical expenditure impacts in the analyses that accompany their regulations, with the results being categorized as benefits (positive benefits if expenditures are reduced, negative benefits if expenditures are raised). Following the FDA, OSHA and MSHA accounting convention leads to this final rule’s medical expenditure impacts being categorized as (positive or negative) benefits, rather than as costs, thus placing them outside of consideration for EO 13771 designation purposes.

1402, 1412, Pub. L. 111–148, 124 Stat. 119 (42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701); and Pub. L. 103–141, 107 Stat. 1488 (42 U.S.C. 2000bb–2000bb–4).

\* \* \* \* \*

Kirsten Wielobob,  
*Deputy Commissioner for Services and Enforcement.*

Approved: October 30, 2018

David J. Kautter,  
*Assistant Secretary for Tax Policy.*

(Filed by the Office of the Federal Register on November 7, 2018, 4:15 p.m., and published in the issue of the Federal Register for November 15, 2018, 83 F.R. 57536)

Signed this 29<sup>th</sup> day of October, 2018.

Preston Rutledge,  
*Assistant Secretary Employee Benefits Security Administration.*

*Department of Labor*  
Dated: *October 17, 2018.*

Seema Verma,  
*Administrator, Centers for Medicare & Medicaid Services.*  
Dated: *October 18, 2018.*

Alex M. Azar II,  
*Secretary, Department of Health and Human Services.*

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

Accordingly, 26 CFR part 54 is amended as follows:

#### PART 54—PENSION EXCISE TAXES

1. The authority citation for part 54 continues to read, in part, as follows:

**Authority:** 26 U.S.C. 7805. \* \* \*

2. Section 54.9815–2713 is amended by

revising paragraphs (a)(1) introductory text and (a)(1)(iv) to read as follows:

#### § 54.9815–2713 Coverage of preventive health services.

(a) \* \* \*

(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for and must not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) for—

\* \* \* \* \*

(iv) With respect to women, such additional preventive care and screenings not described in paragraph (a)(1)(i) of this section as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of section 2713(a)(4) of the Public Health Service Act, subject to 45 CFR 147.131 and 147.132.

\* \* \* \* \*

3. Section 54.9815–2713A is revised to read as follows:

#### § 54.9815–2713A Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations for optional accommodation.* An eligible organization is an organization that meets the criteria of paragraphs (a)(1) through (4) of this section.

(1) The organization is an objecting entity described in 45 CFR 147.132(a)(1)(i) or (ii);

(2) Notwithstanding its status under paragraph (a)(1) of this section and under 45 CFR 147.132(a), the organization voluntarily seeks to be considered an eligible organization to invoke the optional accommodation under paragraph (b) or (c) of this section as applicable; and

(3) [Reserved]

(4) The organization self-certifies in the form and manner specified by the Secretary of Labor or provides notice to the Secretary of the Department of Health and Human Services as described in paragraph (b) or (c) of this section. To qualify as an eligible organization, the organization

must make such self-certification or notice available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification or notice must be executed by a person authorized to make the certification or provide the notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(5) An eligible organization may revoke its use of the accommodation process, and its issuer or third party administrator must provide participants and beneficiaries written notice of such revocation, as specified herein.

(i) *Transitional rule*—If contraceptive coverage is being offered on the date on which these final rules go into effect, by an issuer or third party administrator through the accommodation process, an eligible organization may give 60-days notice pursuant to section 2715(d)(4) of the PHS Act and § 54.9815–2715(b), if applicable, to revoke its use of the accommodation process (to allow for the provision of notice to plan participants in cases where contraceptive benefits will no longer be provided). Alternatively, such eligible organization may revoke its use of the accommodation process effective on the first day of the first plan year that begins on or after 30 days after the date of the revocation.

(ii) *General rule*—In plan years that begin after the date on which these final rules go into effect, if contraceptive coverage is being offered by an issuer or third party administrator through the accommodation process, an eligible organization's revocation of use of the accommodation process will be effective no sooner than the first day of the first plan year that begins on or after 30 days after the date of the revocation.

(b) *Optional accommodation—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis may voluntarily elect an optional accommodation under which its third party administrator(s) will provide or arrange payments for all or a subset of contraceptive services for one or more plan years. To in-

voke the optional accommodation process:

(i) The eligible organization or its plan must contract with one or more third party administrators.

(ii) The eligible organization must provide either a copy of the self-certification to each third party administrator or a notice to the Secretary of the Department of Health and Human Services that it is an eligible organization and of its objection as described in 45 CFR 147.132 to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization; a statement that it objects as described in 45 CFR 147.132 to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable), but that it would like to elect the optional accommodation process; the plan name and type (that is, whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of section 3(33) of ERISA); and the name and contact information for any of the plan's third party administrators. If there is a change in any of the information required to be included in the notice, the eligible organization must provide updated information to the Secretary of the Department of Health and Human Services for the optional accommodation process to remain in effect. The Department of Labor (working with the Department of Health and Human Services) will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of the Department of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3–16 and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and is willing to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, then the third party administrator will provide or arrange payments for contraceptive services, using one of the following methods—

(i) Provide payments for the contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for the contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the federally facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(5) Where an otherwise eligible organization does not contract with a third party administrator and files a self-certification or notice under paragraph (b)(1)(ii) of this section, the obligations under paragraph (b)(2) of this section do not apply, and the otherwise eligible organization is under no requirement to provide coverage or payments for contraceptive services to which it objects. The plan administrator for that other-

wise eligible organization may, if it and the otherwise eligible organization choose, arrange for payments for contraceptive services from an issuer or other entity in accordance with paragraph (b)(2)(ii) of this section, and such issuer or other entity may receive reimbursements in accordance with paragraph (b)(3) of this section.

(6) Where an otherwise eligible organization is an ERISA-exempt church plan within the meaning of section 3(33) of ERISA and it files a self-certification or notice under paragraph (b)(1)(ii) of this section, the obligations under paragraph (b)(2) of this section do not apply, and the otherwise eligible organization is under no requirement to provide coverage or payments for contraceptive services to which it objects. The third party administrator for that otherwise eligible organization may, if it and the otherwise eligible organization choose, provide or arrange payments for contraceptive services in accordance with paragraphs (b)(2)(i) or (ii) of this section, and receive reimbursements in accordance with paragraph (b)(3) of this section.

(c) *Optional accommodation—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers may voluntarily elect an optional accommodation under which its health insurance issuer(s) will provide payments for all or a subset of contraceptive services for one or more plan years. To invoke the optional accommodation process—

(i) The eligible organization or its plan must contract with one or more health insurance issuers.

(ii) The eligible organization must provide either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of the Department of Health and Human Services that it is an eligible organization and of its objection as described in 45 CFR 147.132 to coverage for all or a subset of contraceptive services.

(A) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815–2713.

(B) When a notice is provided to the Secretary of the Department Health and



Human Services, the notice must include the name of the eligible organization; a statement that it objects as described in 45 CFR 147.132 to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable) but that it would like to elect the optional accommodation process; the plan name and type (that is, whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of section 3(33) of ERISA); and the name and contact information for any of the plan's health insurance issuers. If there is a change in any of the information required to be included in the notice, the eligible organization must provide updated information to the Secretary of Department of Health and Human Services for the optional accommodation process to remain in effect. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of the Department Health and Human Services has received a notice under paragraph (c)(2)(ii) of this section and describing the obligations of the issuer under this section.

(2) If an issuer receives a copy of the self-certification from an eligible organization or the notification from the Department of Health and Human Services as described in paragraph (c)(2)(ii) of this section and does not have its own objection as described in 45 CFR 147.132 to providing the contraceptive services to which the eligible organization objects, then the issuer will provide payments for contraceptive services as follows—

(i) The issuer must expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan and provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, di-

rectly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815 of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(3) A health insurance issuer may not require any documentation other than a copy of the self-certification from the eligible organization or the notification from the Department of Health and Human Services described in paragraph (c)(1)(ii) of this section.

(d) *Notice of availability of separate payments for contraceptive services - self-insured and insured group health plans.* For each plan year to which the optional accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides or arranges separate payments for contraceptive services, and must provide

contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): “Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer].”

(e) *Reliance—insured group health plans—*(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any applicable requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any applicable requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) *Definition.* For the purposes of this section, reference to “contraceptive” services, benefits, or coverage includes contraceptive or sterilization items, procedures, or services, or related patient education or counseling, to the extent specified for purposes of § 54.9815–2713(a)(1)(iv).

(g) *Severability.* Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or

circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

**§ 54.9815–2713T [REMOVED]**

4. Section 54.9815–2713T is removed.

**§ 54.9815–2713AT [REMOVED]**

5. Section 54.9815–2713AT is removed.

**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

For the reasons set forth in the preamble, the Department of Labor adopts as final the interim final rules amending 29 CFR part 2590 published on October 13, 2017 (82 FR 47792) with the following changes:

**PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS**

6. The authority citation for part 2590 continues to read, as follows:

**AUTHORITY:** 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Division M, Pub. L. 113–235, 128 Stat. 2130; Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

7. Section 2590.715–2713A is amended by:

- a. Revising paragraph (a)(5);
- b. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g); and
- c. Adding new paragraph (e).

The revision and addition read as follows:

**§ 2590.715–2713A Accommodations in connection with coverage of preventive health services.**

(a) \* \* \*

(5) An eligible organization may revoke its use of the accommodation process, and its issuer or third party administrator must provide participants and beneficiaries written notice of such revocation, as specified herein.

(i) *Transitional rule*—If contraceptive coverage is being offered on the date on which these final rules go into effect, by an issuer or third party administrator through the accommodation process, an eligible organization may give 60-days notice pursuant to PHS Act section 2715(d)(4) and § 2590.715–2715(b), if applicable, to revoke its use of the accommodation process (to allow for the provision of notice to plan participants in cases where contraceptive benefits will no longer be provided). Alternatively, such eligible organization may revoke its use of the accommodation process effective on the first day of the first plan year that begins on or after 30 days after the date of the revocation.

(ii) *General rule*—In plan years that begin after the date on which these final rules go into effect, if contraceptive coverage is being offered by an issuer or third party administrator through the accommodation process, an eligible organization’s revocation of use of the accommodation process will be effective no sooner than the first day of the first plan year that begins on or after 30 days after the date of the revocation.

\* \* \* \* \*

(e) *Reliance—insured group health plans*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any applicable requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any applicable requirement under § 2590.715–2713(a)(1)(iv) to pro-

vide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

\* \* \* \* \*

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

For the reasons set forth in the preamble, the Department of Health and Human Services adopts as final the interim final rules amending 45 CFR part 147 published on October 13, 2017 (82 FR 47792) with the following changes:

**PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS**

8. The authority citation for part 147 is revised to read as follows:

**Authority:** 42 USC 300gg through 300gg–63, 300gg–91, and 300gg–92, as amended.

9. Section 147.131 is amended by:

- a. Revising paragraph (c)(4);
- b. Redesignating paragraphs (f) and (g) as (g) and (h); and
- c. Adding new paragraph (f).

The revision and addition read as follows:

**§ 147.131 Accommodations in connection with coverage of certain preventive health services.**

\* \* \* \* \*

(c) \* \* \*

(4) An eligible organization may revoke its use of the accommodation process, and its issuer must provide participants and beneficiaries written notice of such revocation, as specified herein.

(i) *Transitional rule*—If contraceptive coverage is being offered on[INSERT DATE THAT IS 60 DAYS FOLLOWING THE DATE OF PUBLICATION IN THE FEDERAL REGISTER], by an issuer through the accommodation process, an eligible organization may give 60-days notice pursuant to section 2715(d)(4) of the PHS Act and § 147.200(b), if applicable, to revoke its use of the accommodation process (to allow for the provision of notice to plan participants in cases where contraceptive benefits will no longer be

provided). Alternatively, such eligible organization may revoke its use of the accommodation process effective on the first day of the first plan year that begins on or after 30 days after the date of the revocation.

(ii) *General rule*—In plan years that begin after [INSERT DATE THAT IS 60 DAYS FOLLOWING THE DATE OF PUBLICATION IN THE FEDERAL REGISTER], if contraceptive coverage is being offered by an issuer through the accommodation process, an eligible organization’s revocation of use of the accommodation process will be effective no sooner than the first day of the first plan year that begins on or after 30 days after the date of the revocation.

\* \* \* \* \*

(f) *Reliance*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (d) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any applicable requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any applicable requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (d) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

\* \* \* \* \*

10. Section 147.132 is amended by:

- a. Revising paragraph (a)(1) introductory text;
- b. Redesignating paragraphs (a)(1)(ii) and (iii) as paragraphs (iii) and (iv);
- c. Adding new paragraph (a)(1)(ii);
- d. Revising newly designated paragraph (a)(1)(iii);
- e. Revising newly designated paragraph (a)(1)(iv); and
- f. Revising paragraphs (a)(2) and (b). The revisions and addition read as follows:

**§ 147.132 Religious exemptions in connection with coverage of certain preventive health services.**

(a) \* \* \*

(1) Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections specified below. Thus the Health Resources and Service Administration will exempt from any guidelines’ requirements that relate to the provision of contraceptive services:

\* \* \* \* \*

(ii) A group health plan, and health insurance coverage provided in connection with a group health plan, where the plan or coverage is established or maintained by a church, an integrated auxiliary of a church, a convention or association of churches, a religious order, a nonprofit organization, or other non-governmental organization or association, to the extent the plan sponsor responsible for establishing and/or maintaining the plan objects as specified in paragraph (a)(2) of this section. The exemption in this paragraph applies to each employer, organization, or plan sponsor that adopts the plan;

(iii) An institution of higher education as defined in 20 U.S.C. 1002, which is non-governmental, in its arrangement of student health insurance coverage, to the extent that institution objects as specified in paragraph (a)(2) of this section. In the case of student health insurance coverage, this section is applicable in a manner comparable to its applicability to group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer, and references to “plan participants and beneficiaries” will be interpreted as references to student enrollees and their covered dependents; and

(iv) A health insurance issuer offering group or individual insurance coverage to the extent the issuer objects as specified in paragraph (a)(2) of this section. Where a health insurance issuer providing group health insurance coverage is exempt under

this subparagraph (iv), the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement.

(2) The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for (as applicable):

(i) Coverage or payments for some or all contraceptive services; or

(ii) A plan, issuer, or third party administrator that provides or arranges such coverage or payments.

(b) *Objecting individuals.* Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to individuals who object as specified in this paragraph (b), and nothing in § 147.130(a)(1)(iv), 26 CFR 54.9815–2713(a)(1)(iv), or 29 CFR 2590.715–2713(a)(1)(iv) may be construed to prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

\* \* \* \* \*



**T.D. 9841**

**DEPARTMENT OF THE  
TREASURY  
Internal Revenue Service  
26 CFR Part 54**

**DEPARTMENT OF LABOR  
Employee Benefits Security  
Administration  
29 CFR Part 2590**

**DEPARTMENT OF HEALTH  
AND HUMAN SERVICES  
45 CFR Part 147**

**Moral Exemptions and  
Accommodations for  
Coverage of Certain  
Preventive Services Under  
the Affordable Care Act**

**AGENCIES:** Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; and Centers for Medicare & Medicaid Services, Department of Health and Human Services.

**ACTION:** Final rules.

**SUMMARY:** These rules finalize, with changes based on public comments, the interim final rules issued in the **Bulletin** on October 13, 2017 concerning moral exemptions and accommodations regarding coverage of certain preventive services. These rules finalize expanded exemptions to protect moral beliefs for certain entities and individuals whose health plans are subject to a mandate of contraceptive coverage through guidance issued pursuant to the Patient Protection and Affordable Care Act. These rules do not alter the discretion of the Health Resources and Services Administration, a component of the U.S. Department of Health and Human Services, to maintain the guidelines requiring contraceptive coverage where no regulatorily recognized objection exists. These rules also leave in place an optional “accommodation” process for certain exempt entities that wish to use it voluntarily. These rules do not alter multiple other federal programs that provide free or subsidized con-

traceptives for women at risk of unintended pregnancy.

**DATES:** *Effective date:* These regulations are effective on January 14, 2019.

**FOR FURTHER INFORMATION**

**CONTACT:** Jeff Wu at (301) 492-4305 or [marketreform@cms.hhs.gov](mailto:marketreform@cms.hhs.gov) for the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

Amber Rivers or Matthew Litton at (202) 693-8335 for Employee Benefits Security Administration (EBSA), Department of Labor (DOL). William Fischer at (202) 317-5500 for Internal Revenue Service, Department of the Treasury (not toll-free numbers).

*Customer Service Information:* Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit DOL’s website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)). Information from HHS on private health insurance coverage can be found on CMS’s website ([www.cms.gov/cciiio](http://www.cms.gov/cciiio)), and information on health care reform can be found at [www.HealthCare.gov](http://www.HealthCare.gov).

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## I. Executive Summary and Background

### A. Executive Summary

#### 1. Purpose

The primary purpose of these final rules is to finalize, with changes in response to public comments, the interim final regulations with requests for comments (IFCs) published in the **Federal Register** on October 13, 2017 (82 FR 47838), “Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act” (the Moral IFC). The rules are necessary to protect sincerely held moral objections of certain entities and individuals. The rules, thus, minimize the burdens imposed on their moral beliefs, with regard to the discretionary requirement that health plans cover certain contraceptive services with no cost-sharing, which was created by HHS through guidance promulgated by the Health Resources and Services Administration (HRSA), pursuant to authority granted by the ACA in section 2713(a)(4) of the Public Health Service Act. In addition, the rules finalize references to these moral exemptions in the previously created accommodation process that permit entities with certain objections voluntarily to continue to object while the persons covered in their plans receive contraceptive coverage or payments arranged by their issuers or third party administrators. The rules do not remove the contraceptive coverage requirement generally from HRSA’s guidelines. The changes to the rules being finalized will ensure clarity in implementation of the moral exemptions so that proper respect is afforded to sincerely held moral convictions in rules

governing this area of health insurance and coverage, with minimal impact on HRSA’s decision to otherwise require contraceptive coverage.

#### 2. Summary of the Major Provisions

##### a. Moral exemptions

These rules finalize exemptions provided in the Moral IFC for the group health plans and health insurance coverage of various entities and individuals with sincerely held moral convictions opposed to coverage of some or all contraceptive or sterilization methods encompassed by HRSA’s guidelines. As in the Moral IFC, the exemptions include plan sponsors that are nonprofit organization plan sponsors or for-profit entities that have no publicly traded ownership interests (defined as any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934). The exemptions also continue to include institutions of higher education in their arrangement of student health insurance coverage; health insurance issuers (but only with respect to plans that are otherwise also exempt under the rules); and objecting individuals with respect to their own coverage, where their health insurance issuer and plan sponsor, as applicable, are willing to provide coverage complying with the individual’s moral objection. After considering public comments, the Departments have decided not to extend the moral exemptions to non-federal governmental entities at this time, although individuals receiving employer-sponsored insurance from a governmental entity may use the individual exemption if the other terms of the individual exemption apply, including that their employer is willing to offer them a plan consistent with their moral objection.

In response to public comments, various changes are made to clarify the intended scope of the language in the Moral IFC’s exemptions. The prefatory exemption language is clarified to ensure exemptions apply to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections. The Departments add language to specify that the exemption for institutions of higher education applies to non-governmental en-

ties. The Departments also modified language describing the moral objection applicable to the exemptions, to specify that the entity objects, based on its sincerely held moral convictions, to its establishing, maintaining, providing, offering, or arranging for (as applicable) either: coverage or payments for some or all contraceptive services; or a plan, issuer, or third party administrator that provides or arranges such coverage or payments.

The Departments also clarify language in the exemption applicable to plans of objecting individuals. The clarification is made to ensure that the HRSA guidelines do not prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions. The exemption adds that, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

##### b. References to moral exemptions in accommodation regulations and in regulatory restatement of statutory language

These rules finalize without change the references to the moral exemptions that were inserted by the Moral IFC into the rules that regulatorily restate the statutory language from section 2713(a) and (a)(4) of the Public Health Service Act. Similarly, these rules finalize without change from the Moral IFC references to the moral exemptions that were inserted into the regulations governing the optional accommodation process. These references operationalize the effect of the moral exemptions rule, and they allow contracep-

tive services to be made available to women if any employers with non-religious moral objections to contracep-

tive coverage choose to use the optional accommodation process.

### 3. Summary of Costs, Savings and Benefits of the Major Provisions

Provision	Savings and Benefits	Costs
Finalizing insertion of references to moral exemptions into restatement of statutory language from section 2713(a) and (a)(4) of the Public Health Service Act	These provisions, finalized without change, are for the purpose of inserting references to the moral exemptions into the the regulatory restatement of section 2713(a) and (a)(4) of the Public Health Service Act, which already references the religious exemptions. This operationalizes the moral exemptions in each of the tri-agencies' rules. We estimate no economic savings or benefit from finalizing this part of the rule, but consider it a deregulatory action to minimize the regulatory impact beyond the scope set forth in the statute.	We estimate no costs from finalizing this part of the rule.
Finalized moral exemptions	The moral exemptions to the contraceptive coverage requirement are finalized with technical changes. Their purpose is to relieve burdens that some entities and individuals experience from being forced to choose between, on the one hand, complying with their moral beliefs and facing penalties from failing to comply with the contraceptive coverage requirement, and on the other hand, providing (or, for individuals, obtaining) contraceptive coverage in violation of their sincerely held moral beliefs.	We estimate there will be only a small amount of costs for these exemptions, because they will primarily be used by organizations and individuals that do not want contraceptive coverage. To the extent some other employers will use the exemption where there will be transfer costs for women previously receiving contraceptive coverage who will no longer receive that coverage, we expect those costs to be minimal due to the small number of entities expected to use the exemptions with non-religious moral objections. We estimate the transfer costs will amount to \$8,760.
Finalizing insertion of references to moral exemptions into optional accommodation regulations	These provisions, finalized without change, will allow organizations with moral objections to contraceptive coverage on the basis of sincerely held moral convictions to use the accommodation as an optional process. These provisions will allow contraceptive coverage to be made available to women covered by plans of employers that object to contraceptive coverage but do not object to their issuers or third party administrators arranging for such coverage to be provided to persons covered by their plans.	We do not estimate any entities with non-religious moral objections to use the accommodation process at this time.

#### B. Background

Over many decades, Congress has protected conscientious objections including

based on moral convictions in the context of health care and human services, and including health coverage, even as it has sought to promote access to health ser-

vices.<sup>124</sup> In 2010, Congress enacted the Patient Protection and Affordable Care Act (PPACA) (Pub. L. 111–148) (March 23, 2010). Congress enacted the Health

<sup>124</sup>See, for example, 42 U.S.C. 300a-7 (protecting individuals and health care entities from being required to provide or assist sterilizations, abortions, or other lawful health services if it would violate their “religious beliefs or moral convictions”); 42 U.S.C. 238n (protecting individuals and entities that object to abortion); Consolidated Appropriations Act, 2018, Div. H, Sec. 507(d) (Departments of Labor, HHS, and Education, and Related Agencies Appropriations Act), Pub. L. No. 115-141, 132 Stat. 348, 764 (Mar. 23, 2018) (protecting any “health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan” in objecting to abortion for any reason); *Id.* at Div. E, Sec. 726(c) (Financial Services and General Government Appropriations Act) (protecting individuals who object to prescribing or providing contraceptives contrary to their “religious beliefs or moral convictions”); *Id.* at Div. E, Sec. 808 (regarding any requirement of “the provision of contraceptive coverage by health insurance plans” in the District of Columbia, “it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions.”); *Id.* at Div. K, Title III (Department of State, Foreign Operations, and Related Programs Appropriations Act) (protecting applicants for family planning funds based on their “religious or conscientious commitment to offer only natural family planning”); 42 U.S.C. 290bb-36 (prohibiting the statutory



Care and Education Reconciliation Act of 2010 (HCERA) (Pub. L. 111–152) on March 30, 2010, which, among other things, amended PPACA. As amended by HCERA, PPACA is known as the Affordable Care Act (ACA).

The ACA reorganized, amended, and added to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The ACA added section 715(a)(1) to the Employee Retirement Income Security Act of 1974 (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code), in order to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The sections of the PHS Act incorporated into ERISA and the Code are sections 2701 through 2728.

In section 2713(a)(4) of the PHS Act (hereinafter “section 2713(a)(4)”), Congress provided administrative discretion to require that certain group health plans and health insurance issuers cover certain women’s preventive services, in addition to other preventive services required to be covered in section 2713.

Congress granted that discretion to the Health Resources and Services Administration (HRSA), a component of the U.S. Department of Health and Human Services (HHS). Specifically, section 2713(a)(4) allows HRSA discretion to specify coverage requirements, “with respect to women, such additional preventive care and screenings as provided for in comprehensive guidelines supported” by HRSA (the “Guidelines”).

Since 2011, HRSA has exercised that discretion to require coverage for, among other things, certain contraceptive services.<sup>125</sup> In the same time period, the administering agencies—HHS, the Department of Labor, and the Department of the Treasury (collectively, “the Departments”<sup>126</sup>)—exercised discretion to allow exemptions to those requirements by issuing rulemaking various times, including issuing and finalizing three interim final regulations prior to 2017.<sup>127</sup> In those regulations, the Departments crafted exemptions and accommodations for certain religious objectors where the Guidelines require coverage of contraceptive services, changed the scope of those exemptions and accommodations, and solicited public comments on a number of occasions. Public comments were submitted on various iterations of the regulations is-

sued before 2017, and some of those comments supported expanding the exemptions to include those who oppose the contraceptive coverage mandate for either religious “or moral” reasons, consistent with various state laws (such as in Connecticut or Missouri) that protect objections to contraceptive coverage based on moral convictions.<sup>128</sup>

During the period when the Departments were publishing and modifying the regulations, organizations and individuals filed dozens of lawsuits challenging the contraceptive coverage requirement and regulations (hereinafter, the “contraceptive Mandate,” or the “Mandate”). Plaintiffs included religious nonprofit organizations, businesses run by religious families, individuals, and others, including several non-religious organizations that opposed coverage of certain contraceptives under the Mandate on the basis of non-religious moral convictions. For-profit entities with religious objections won various court decisions leading to the Supreme Court’s ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Supreme Court ruled against the Departments and held that, under the Religious Freedom Restoration Act of 1993 (RFRA), the Mandate could not be applied to the closely held for-profit corporations before the Court because their owners had reli-

section from being construed to require suicide related treatment services for youth where the parents or legal guardians object based on “religious beliefs or moral objections”); 42 U.S.C. 1395w-22(j)(3)(B) (protecting against forced counseling or referrals in Medicare+Choice, now Medicare Advantage, managed care plans with respect to objections based on “moral or religious grounds”); 42 U.S.C. 1396a(w)(3) (ensuring particular Federal law does not infringe on “conscience” as protected in State law concerning advance directives); 42 U.S.C. 1396u-2(b)(3) (protecting against forced counseling or referrals in Medicaid managed care plans with respect to objections based on “moral or religious grounds”); 42 U.S.C. 2996f(b) (protecting objection to abortion funding in legal services assistance grants based on “religious beliefs or moral convictions”); 42 U.S.C. 14406 (protecting organizations and health providers from being required to inform or counsel persons pertaining to assisted suicide); 42 U.S.C. 18023 (blocking any requirement that issuers or exchanges must cover abortion); 42 U.S.C. 18113 (protecting health plans or health providers from being required to provide an item or service that helps cause assisted suicide); *see also* 8 U.S.C. 1182(g) (protecting vaccination objections by “aliens” due to “religious beliefs or moral convictions”); 18 U.S.C. 3597 (protecting objectors to participation in Federal executions based on “moral or religious convictions”); 20 U.S.C. 1688 (prohibiting sex discrimination law to be used to require assistance in abortion for any reason); 22 U.S.C. 7631(d) (protecting entities from being required to use HIV/AIDS funds contrary to their “religious or moral objection”).

<sup>125</sup>The references in this document to “contraception,” “contraceptive,” “contraceptive coverage,” or “contraceptive services” generally include all contraceptives, sterilization, and related patient education and counseling, required by the Women’s Preventive Guidelines, unless otherwise indicated. The Guidelines issued in 2011 referred to “Contraceptive Methods and Counseling” as “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” <https://www.hrsa.gov/womens-guidelines/index.html>. The Guidelines as amended in December 2016 refer, under the header “Contraception,” to: “the full range of female-controlled U.S. Food and Drug Administration-approved contraceptive methods, effective family planning practices, and sterilization procedures,” “contraceptive counseling, initiation of contraceptive use, and follow-up care (e.g., management, and evaluation as well as changes to and removal or discontinuation of the contraceptive method),” and “instruction in fertility awareness-based methods, including the lactation amenorrhea method.” <https://www.hrsa.gov/womens-guidelines-2016/index.html>.

<sup>126</sup>Note, however, that in sections under headings listing only two of the three Departments, the term “Departments” generally refers only to the two Departments listed in the heading.

<sup>127</sup>Interim final regulations on July 19, 2010, at 75 FR 41726 (July 2010 interim final regulations); interim final regulations amending the July 2010 interim final regulations on August 3, 2011, at 76 FR 46621; final regulations on February 15, 2012, at 77 FR 8725 (2012 final regulations); an advance notice of proposed rulemaking (ANPRM) on March 21, 2012, at 77 FR 16501; proposed regulations on February 6, 2013, at 78 FR 8456; final regulations on July 2, 2013, at 78 FR 39870 (July 2013 final regulations); interim final regulations on August 27, 2014, at 79 FR 51092 (August 2014 interim final regulations); proposed regulations on August 27, 2014, at 79 FR 51118 (August 2014 proposed regulations); final regulations on July 14, 2015, at 80 FR 41318 (July 2015 final regulations); and a request for information on July 26, 2016, at 81 FR 47741 (RFI), which was addressed in an FAQ document issued on January 9, 2017, available at: <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36\\_1-9-17-Final.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36_1-9-17-Final.pdf).

<sup>128</sup>*See, for example*, Denise M. Burke, Re: file code CMS-9968-P, Regulations.gov (posted May 5, 2013), <http://www.regulations.gov/#/documentDetail;D=CMS-2012-0031-79115>; Comment, Regulations.gov (posted Oct. 26, 2016), <https://www.regulations.gov/document?D=CMS-2016-0123-54142>; David Sater, Re: CMS-9931-NC: Request for Information, Regulations.gov (posted Oct. 26, 2016), <https://www.regulations.gov/document?D=CMS-2016-0123-54218>; Comment, Regulations.gov (posted Oct. 26, 2016), <https://www.regulations.gov/document?D=CMS-2016-0123-46220>.

gious objections to providing such coverage.<sup>129</sup> Later, a second series of legal challenges were filed by religious nonprofit organizations that stated the accommodation impermissibly burdened their religious beliefs because it utilized their health plans to provide services to which they objected on religious grounds, and it required them to submit a self-certification or notice. On May 16, 2016, the Supreme Court issued a per curiam decision, vacating the judgments of the Courts of Appeals—most of which had ruled in the Departments’ favor—and remanding the cases “in light of the substantial clarification and refinement in the positions of the parties” that had been filed in supplemental briefs. *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016). The Court stated that it anticipated that, on remand, the Courts of Appeals would “allow the parties sufficient time to resolve any outstanding issues between them.” *Id.*

Beginning in 2015, lawsuits challenging the Mandate were also filed by various non-religious organizations with moral objections to contraceptive coverage. These organizations stated that they believe some methods classified by the Food and Drug Administration (FDA) as contraceptives may have an abortifacient effect and, therefore, in their view, are morally equivalent to abortion to which they have a moral objection. Under regulations preceding October 2017, these organizations neither received an exemption from the Mandate nor qualified for the accommodation. For example, March for Life filed a complaint claiming that the Mandate violated the equal protection component of the Due Process Clause of the Fifth Amendment, and was arbitrary and capricious under the Administrative Procedure Act (APA). Citing, for example, 77 FR 8727, March for Life argued that the Departments’ stated interests behind the Mandate were only advanced among women who “want” the coverage so as to prevent “unintended” pregnancy. March for Life contended that, because it only hires employees who publicly advocate against abortion, including what they regard as abortifacient contraceptive items, the Departments’ interests were not rationally advanced by imposing the Mandate upon it and its employees. Accordingly,

March for Life contended that applying the Mandate to it (and other similarly situated organizations) lacked a rational basis and, therefore, was arbitrary and capricious in violation of the APA. March for Life further contended that, because the Departments concluded the government’s interests were not undermined by exempting houses of worship and integrated auxiliaries (based on the assumption that such entities are relatively more likely than other nonprofits with religious objections to have employees that share their views against certain contraceptives), applying the Mandate to March for Life or similar organizations that definitively hire only employees who oppose certain contraceptives lacked a rational basis and, therefore, violated their right of equal protection under the Due Process Clause.

March for Life’s employees, who stated they were personally religious (although personal religiosity was not a condition of their employment), also sued as co-plaintiffs. They contended that the Mandate violated their rights under RFRA by making it impossible for them to obtain health coverage consistent with their religious beliefs, either from the plan March for Life wanted to offer them, or in the individual market, because the Departments offered no exemptions in either circumstance. Another non-religious nonprofit organization that opposed the Mandate’s requirement to provide certain contraceptive coverage on moral grounds also filed a lawsuit challenging the Mandate. *Real Alternatives, Inc. v. Burwell*, 150 F. Supp. 3d 419 (M.D. Pa. 2015).

Challenges by non-religious nonprofit organizations led to conflicting opinions among the federal courts. A district court agreed with the March for Life plaintiffs on the organization’s equal protection claim and the employees’ RFRA claims, while not specifically ruling on the APA claim, and issued a permanent injunction against the Departments that is still in place. *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015). The appeal in *March for Life* is pending and has been stayed since early 2016. In another case, federal district and appellate courts in Pennsylvania disagreed with the reasoning in *March for Life*, and ruled against

claims brought by a similarly non-religious nonprofit employer and its religious employees. *Real Alternatives*, 150 F. Supp. 3d 419, *affirmed by* 867 F.3d 338 (3d Cir. 2017). One member of the appeals court panel in *Real Alternatives v. Sec’y of HHS* dissented in part, stating he would have ruled in favor of the individual employee plaintiffs under RFRA. 867 F.3d 338, 367 (3d Cir. 2017) (Jordan, J., dissenting).

The Departments most recently solicited public comments on these issues again in two interim final regulations with request for comments published in the **Federal Register** on October 13, 2017: the regulations (82 FR 47838) (the Moral IFC) that are being finalized with changes here, and the regulations (82 FR 47792) (the Religious IFC) published on the same day as the Moral IFC, which are being finalized with changes in the companion final rules published elsewhere in today’s **Federal Register**.

In the preamble to the Moral IFC, the Departments explained several reasons why, after exercising our discretion to re-evaluate the exemptions and accommodations for the contraceptive Mandate, we sought public comment on whether to protect moral convictions in the Moral IFC and these final rules. The Departments noted that we considered, among other things, Congress’s history of providing protections for moral convictions regarding certain health services (including contraception, sterilization, and items or services believed to involve abortion); the text, context, and intent of section 2713(a)(4) and the ACA; Executive Order 13798, “Promoting Free Speech and Religious Liberty” (May 4, 2017); previously submitted public comments; and the extensive litigation over the contraceptive Mandate. The Departments concluded that it was appropriate that HRSA take into account the moral convictions of certain employers, individuals and health insurance issuers where the coverage of contraceptive services is concerned. Comments were requested on the interim final regulations.

After consideration of the comments and feedback received from stakeholders, the Departments are finalizing the Moral

<sup>129</sup>The Supreme Court did not decide whether RFRA would apply to publicly traded for-profit corporations. See 134 S. Ct. at 2774.

IFC, with changes based on comments as indicated herein.<sup>130</sup>

## II. Overview of the Final Rules and Public Comments

During the 60-day comment period for the Moral IFC, which closed on December 5, 2017, the Departments received over 54,000 public comment submissions, which are posted to [www.regulations.gov](http://www.regulations.gov).<sup>131</sup> Below, the Departments provide an overview of the final rules and address the issues raised in the comments we received.

### A. Moral Exemptions and Accommodation in General

These rules expand exemptions to protect certain entities and individuals with moral convictions that oppose contraception whose health plans are subject to a mandate of contraceptive coverage through guidance issued pursuant to the ACA. These rules do not alter the discretion of HRSA, a component of HHS, to maintain the Guidelines requiring contraceptive coverage where no regulatorily recognized objection exists. These rules also make available to exempt organizations the accommodation process, which was previously established in response to some objections of religious organizations, as an optional process for exempt entities that wish to use it voluntarily. These rules do not alter multiple other federal programs that provide free or subsidized contraceptives or related education and counseling for women at risk of unintended pregnancy.<sup>132</sup>

#### 1. The Departments' Authority to Mandate Coverage or Provide Exemptions

The Departments received conflicting comments on their legal authority to pro-

vide exemptions and accommodations to the Mandate. Some commenters agreed that the Departments are legally authorized to provide expanded exemptions and an accommodation for moral convictions, noting that there was no requirement of contraceptive coverage in the ACA and no prohibition on providing moral exemptions in Guidelines issued under section 2713(a)(4). Other commenters, however, asserted that the Departments have no legal authority to provide any exemptions to the contraceptive Mandate, contending, based on statements in the ACA's legislative history, that the ACA requires contraceptive coverage. Still other commenters contended that the Departments are legally authorized to provide the religious exemptions that existed prior to the 2017 IFCs, but not to protect moral convictions.

The Departments conclude that we are legally authorized to provide the exemption and accommodation for moral convictions set forth in the Moral IFC and these final rules. These rules concern section 2713 of the PHS Act, as incorporated into ERISA and the Code. Congress has granted the Departments legal authority, collectively, to administer these statutes. (26 U.S.C. 9833; 29 U.S.C. 1191c; 42 U.S.C. 300gg–92).

Where it applies, section 2713(a)(4) requires coverage without cost sharing for “such additional” women’s preventive care and screenings “as provided for” and “supported by” guidelines developed by HHS acting through HRSA. When Congress enacted this provision, those Guidelines did not exist. And nothing in the statute mandated that the Guidelines had to include contraception, let alone for all types of employers with covered plans. Instead, section 2713(a)(4) provided a positive grant of authority for HRSA to develop those Guidelines, thus delegating authority to HHS to shape that develop-

ment, as the administering agency of HRSA, and to all three agencies as the administering agencies of the statutes by which the Guidelines are enforced. *See* 26 U.S.C. 9833; 29 U.S.C. 1191(c), 42 U.S.C. 300gg–92. That is especially true for HHS, as HRSA is a component of HHS that was unilaterally created by the agency and thus is subject to the agency’s general supervision, *see* 47 F. R. 38409 (August 31, 1982). Thus, nothing prevented HRSA from creating an exemption from otherwise-applicable guidelines or prevented HHS and the other agencies from directing that HRSA create such an exemption.

Congress did not specify the extent to which HRSA must “provide for” and “support” the application of Guidelines that it chooses to adopt. HRSA’s authority to support “comprehensive guidelines” involves determining both the types of coverage and scope of that coverage. Section 2714(a)(4) requires coverage for preventive services only “as provided for in comprehensive guidelines supported by [HRSA].” That is, services are required to be included in coverage only to the extent that the Guidelines supported by HRSA provide for them. Through use of the word “as” in the phrase “as provided for,” it requires that HRSA support how those services apply—that is, the manner in which the support will happen, such as in the phrase “as you like it.”<sup>133</sup> When Congress means to require certain activities to occur in a certain manner, instead of simply authorizing the agency to decide the manner in which they will occur, Congress knows how to do so. *See for example*, 42 U.S.C. 1395x (“The Secretary shall establish procedures to make beneficiaries and providers aware of the requirement that a beneficiary complete a health risk assessment *prior to or at the same time as* receiving personalized pre-

<sup>130</sup>The Department of the Treasury and Internal Revenue Service published proposed and temporary regulations as part of the joint rulemaking of the Moral IFC. The Departments of Labor and HHS published their respective rules as interim final rules with request for comments and are finalizing their interim final rules in these final rules. The Department of the Treasury and Internal Revenue Service are finalizing their regulations.

<sup>131</sup>*See* [Regulations.gov](https://www.regulations.gov) at <https://www.regulations.gov/searchResults?rpp=25&so=DESC&sb=postedDate&po=0&cmd=12%7C05%7C17-12%7C05%7C17&dktid=CMS-2017-0133> and <https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=postedDate&po=100&D=IRS-2017-0015>. Some of those submissions included form letters or attachments that, while not separately tabulated at [regulations.gov](http://www.regulations.gov), together included comments from, or were signed by, possibly over a hundred thousand separate persons. The Departments reviewed all of the public comments and attachments.

<sup>132</sup>*See, for example*, Family Planning grants in 42 U.S.C. 300, *et seq.*; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. 711; Maternal and Child Health Block Grants, 42 U.S.C. 703; 42 U.S.C. 247b-12; Title XIX of the Social Security Act, 42 U.S.C. 1396, *et seq.*; the Indian Health Service, 25 U.S.C. 13, 42 U.S.C. 2001(a), & 25 U.S.C. 1601, *et seq.*; Health center grants, 42 U.S.C. 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. 248; and the Personal Responsibility Education Program, 42 U.S.C. 713.

<sup>133</sup>*See* As (usage 2), *Oxford English Dictionary Online* (Feb. 2018) (“[u]sed to indicate by comparison the way something happens or is done”).



vention plan services.”) (emphasis added). Thus, the inclusion of “as” in section 300gg–13(a)(3), and its absence in similar neighboring provisions, shows that HRSA has discretion whether to support how the preventive coverage mandate applies—it does not refer to the timing of the promulgation of the Guidelines.

Nor is it simply a textual aberration that the word “as” is missing from the other three provisions in section 2713(a) of the PHS Act. Rather, this difference mirrors other distinctions within that section that demonstrate that Congress intended HRSA to have the discretion the Agencies invoke. For example, sections (a)(1) and (a)(3) require “evidence-based” or “evidence-informed” coverage, while section (a)(4) does not. This difference suggests that the Agencies have the leeway to incorporate policy-based concerns into their decision-making. This reading of section 2713(a)(4) also prevents the statute from being interpreted in a cramped way that allows no flexibility or tailoring, and that would force the Departments to choose between ignoring religious objections in violation of RFRA or else eliminating the contraceptive coverage requirement from the Guidelines altogether. The Departments instead interpret section 2713(a)(4) as authorizing HRSA’s Guidelines to set forth both the kinds of items and services that will be covered, and the scope of entities to which the contraceptive coverage requirement in those Guidelines will apply.

The moral objections at issue here, like the religious objections prompting exemptions dating back to the inception of the Mandate in 2011, may, consistent with the statutory provision, permissibly inform what HHS, through HRSA, decides to provide for and support in the Guidelines. Since the first rulemaking on this subject in 2011, the Departments have consistently interpreted the broad discretion granted to HRSA in section 2713(a)(4) as including the power to reconcile the ACA’s preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive-coverage Mandate. (See 76 FR at 46623.) As the Departments explained at that time, the

HRSA Guidelines “exist solely to bind non-grandfathered group health plans and health insurance issuers with respect to the extent of their coverage of certain preventive services for women,” and “it is appropriate that HRSA . . . takes into account the effect on the religious beliefs of [employers] if coverage of contraceptive services were required in [their] group health plans.” *Id.* Consistent with that longstanding view, Congress’s grant of discretion in section 2713(a)(4), and the lack of a mandate that contraceptives be covered or that they be covered without any exemptions or exceptions, lead the Departments to conclude that we are legally authorized to exempt certain entities or plans from a contraceptive Mandate if HRSA decides to otherwise include contraceptives in its Guidelines.

The Departments’ conclusions are consistent with our interpretation of section 2713 of the PHS Act since 2010, when the ACA was enacted, and since the Departments started to issue interim final regulations implementing that section. The Departments have consistently interpreted section 2713(a)(4) to grant broad discretion to decide the extent to which HRSA will provide for, and support, the coverage of additional women’s preventive care and screenings, including the decision to exempt certain entities and plans, and not to provide for or support the application of the Guidelines with respect to those entities or plans. The Departments created an exemption to the contraceptive Mandate when that Mandate was announced in 2011, and then amended and expanded the exemption and added an accommodation process in multiple rulemakings thereafter. The accommodation process requires the provision of coverage or payments for contraceptives to plan participants in an eligible organization’s health plan by the organization’s insurer or third party administrator. However, the accommodation process itself, in some cases, failed to require contraceptive coverage for many women, because—as the Departments acknowledged at the time—the enforcement mechanism for that process, section 3(16) of ERISA, does not provide a means to impose an obligation to provide contraceptive coverage on the third party administrator of self-insured church plans (see 80 FR 41323). Non-exempt employers participate in many church plans. Therefore, in both the previous exemption, and

in the previous accommodation’s application to self-insured church plans, the Departments have been choosing not to require contraceptive coverage for certain kinds of employers since the Guidelines were adopted. In doing so, the Departments have been acting contrary to commenters who contended the Departments had no authority to create exemptions under section 2713 of the PHS Act, or its incorporation into ERISA and the Code, and who contended instead that the Departments must enforce Guidelines on the broadest spectrum of group health plans as possible, even including churches (see, for example, 2012 final regulations at 77 FR 8726).

The Departments’ interpretation of section 2713(a)(4) is confirmed by the ACA’s statutory structure. Congress did not intend to require entirely uniform coverage of preventive services (see for example, 76 FR 46623). On the contrary, Congress carved out an exemption from section 2713 of the PHS Act (and from several other provisions) for grandfathered plans. In contrast, the grandfathering exemption is not applicable to many of the other provisions in Title I of the ACA—provisions previously referred to by the Departments as providing “particularly significant protections.” (75 FR 34540). Those provisions include (from the PHS Act) section 2704, which prohibits preexisting condition exclusions or other discrimination based on health status in group health coverage; section 2708, which prohibits excessive waiting periods (as of January 1, 2014); section 2711, which relates to lifetime dollar limits; section 2712, which generally prohibits rescission of health coverage; section 2714, which extends dependent child coverage until the child turns 26; and section 2718, which imposes a minimum medical loss ratio on health insurance issuers in the individual and group markets (for insured coverage), and requires them to provide rebates to policyholders if that medical loss ratio is not met. (75 FR 34538, 34540, 34542). Consequently, of the 150 million nonelderly people in America with employer-sponsored health coverage, approximately 25.5 million are estimated to be enrolled in grandfathered

plans not subject to section 2713.<sup>134</sup> Some commenters assert the exemptions for grandfathered plans are temporary, or were intended to be temporary, but as the Supreme Court observed, “there is no legal requirement that grandfathered plans ever be phased out.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 n.10 (2014).

Some commenters argue that Executive Order 13535’s reference to implementing the ACA consistent with certain conscience laws does not justify creating exemptions to contraceptive coverage in the Guidelines, because those laws do not specifically require exemptions in the Guidelines. The Departments, however, believe that they are acting consistent with Executive Order 13535 by creating exemptions using HRSA’s authority under section 2713(a)(4), and the Departments’ administrative authority over the implementation of section 2713(a) of the PHS Act. Executive Order 13535, issued upon the signing of the ACA, specified that “longstanding Federal laws to protect conscience . . . remain intact,” including laws that protect holders of religious beliefs or moral convictions from certain requirements in health care contexts. Although the text of Executive Order 13535 does not require the expanded exemptions confirmed in these final rules, the expanded exemptions are, as explained below, consistent with longstanding federal laws to protect conscience objections, based on religious beliefs or moral convictions regarding certain health matters, and are consistent with the intent that the ACA be implemented in accordance with the conscience protections set forth in those laws.

Some commenters contended that, even though Executive Order 13535 refers to the Church Amendments, the intention of those statutes is narrow, should not be construed to extend to entities instead of to individuals, and should not be construed to prohibit procedures. But those comments mistake the Departments’ position. The Departments are not construing the Church Amendments to require these exemptions, nor do the exemptions pro-

hibit any procedures. Instead, through longstanding federal conscience statutes, Congress has established consistent principles concerning respect for sincerely held moral convictions in sensitive health-care contexts.<sup>135</sup> Under those principles, and absent any contrary requirement of law, the Departments are offering exemptions for sincerely held moral convictions to the extent the Departments otherwise impose a contraceptive Mandate. These exemptions do not prohibit any services, nor authorize employers to prohibit employees from obtaining any services. The exemptions in the Moral IFC and these final rules simply refrain from imposing a federal mandate that employers cover contraceptives in their health plans even if they have sincerely held moral convictions against doing so.

Some commenters stated that the Supreme Court ruled that the exemptions provided for houses of worship and integrated auxiliaries were required by the First Amendment. From this, commenters concluded that the exemptions for houses of worship and integrated auxiliaries are legally authorized, but that exemptions beyond those are not. But the Supreme Court did not rule on the question whether the exemptions provided for houses of worship and integrated auxiliaries were required by the First Amendment, and the Court did not say the Departments must apply the contraceptive Mandate unless RFRA prohibits us from doing so.

The appropriateness of including exemptions to protect moral convictions is informed by Congress’s long history of providing exemptions for moral convictions, especially in certain health care contexts.

## 2. Congress’s History of Protecting Moral Convictions

The Department received numerous comments about its decision in the Moral IFC to exercise its discretion to provide moral exemptions to, and an accommodation under, the contraceptive Mandate. Some commenters agreed with the De-

partments’ decision in the Moral IFC, arguing that it is appropriate to exercise the Departments’ discretion to protect moral convictions in light of Congress’s history of protecting moral convictions in various contexts, especially concerning health care. Other commenters disagreed, saying that existing conscience statutes protecting moral convictions do not require these exemptions and, therefore, the exemptions should not be offered. Some commenters stated that because Congress has provided conscience protections, but did not specifically provide them in section 2713(a)(4), conscience protections are inappropriate in the implementation of that section. Still other commenters went further, disagreeing with conscience protections regarding contraceptives, abortions, or health care in general.

In deciding the most appropriate way to exercise our discretion in this context, the Departments draw on the most recent statements of Congress, along with nearly 50 years of statutes and Supreme Court precedent discussing the protection of moral convictions in certain circumstances—particularly in the context of health care and health coverage. Most recently, Congress expressed its intent on the matter of Government-mandated contraceptive coverage when it declared, with respect to the possibility that the District of Columbia would require contraceptive coverage, that “it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions.” Consolidated Appropriations Act, 2018, Div. E, section 808, Pub. L. No. 115–141, 132 Stat. 348, 603 (Mar. 23, 2018); *see also* Consolidated Appropriations Act, 2017, Div. C, section 808, Pub. L. 115–31 (May 5, 2017). The Departments consider it significant that Congress’s most recent statements on the prospect of Government-mandated contraceptive coverage specifically intend that a conscience clause be included to protect moral convictions.

The Departments also consider significant the many statutes listed above, in

<sup>134</sup>Kaiser Family Foundation & Health Research & Educational Trust, “Employer Health Benefits, 2017 Annual Survey,” Henry J Kaiser Family Foundation (Sept. 19, 2017), <http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017>.

<sup>135</sup>The Departments note that the Church Amendments are the subject of another, ongoing rulemaking process. *See* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 FR 3880 (NPRM Jan. 26, 2018). Since the Departments are not construing the Amendments to require the religious exemptions, we defer issues regarding the scope, interpretation, and protections of the Amendments to HHS in that rulemaking.

section I-Background footnote 1, that show Congress’s consistent protection of moral convictions alongside religious beliefs in the federal regulation of health care. These include laws such as the Church Amendments (dating back to 1973), which we discuss at length below, to the 2018 Consolidated Appropriations Act discussed above. Notably among those laws, and in addition to the Church Amendments, Congress has enacted protections for health plans or health care organizations in Medicaid or Medicare Advantage to object “on moral or religious grounds” to providing coverage of certain counseling or referral services. 42 U.S.C. 1395w–22(j)(3)(B) (protecting against forced counseling or referrals in Medicare + Choice (now Medicare Advantage) managed care plans with respect to objections based on “moral or religious grounds”); 42 U.S.C. 1396u–2(b)(3) (protecting against forced counseling or referrals in Medicaid managed care plans with respect to objections based on “moral or religious grounds”). Congress has also protected individuals who object to prescribing or providing contraceptives contrary to their “religious beliefs or moral convictions.” Consolidated Appropriations Act, 2018, Pub. L. 115–141, Division E, section 726(c); *see also* Consolidated Appropriations Act of 2017, Division C, Title VII, Sec. 726(c) (Financial Services and General Government Appropriations Act), Pub. L. No. 115–31.<sup>136</sup>

The Departments disagree with commenters that suggested we should not consider Congress’s history of protecting moral objections in certain health care contexts due to Congress’s failure to explicitly include exemptions in section 2713(a)(4) itself. The argument by these commenters proves too much, since Congress also did not specifically require contraceptive coverage in section 2713 of the PHS Act. This argument would also negate not just these expanded exemptions, but the previous exemptions provided for houses of worship and integrated auxiliaries, and the indirect exemption for self-insured church plans that use the accom-

modation. Where Congress left so many matters concerning section 2713(a)(4) to agency discretion, the Departments consider it appropriate to implement these expanded exemptions in light of Congress’s long history of respecting moral convictions in the context of certain federal health care requirements.

#### a. The Church Amendments’ Protection of Moral Convictions

One of the most important and well-established federal statutes respecting conscientious objections in specific health care contexts was enacted over the course of several years beginning in 1973, initially as a response to court decisions raising the prospect that entities or individuals might be required to facilitate abortions or sterilizations because they had received federal funds. These sections of the U.S. Code are known as the Church Amendments, named after their primary sponsor, Senator Frank Church (D-Idaho). The Church Amendments specifically provide conscience protections based on sincerely held moral convictions, not just religious beliefs. Among other things, the amendments protect the recipients of certain federal health funds from being required to perform, assist, or make their facilities available for abortions or sterilizations if they object “on the basis of religious beliefs or moral convictions,” and they prohibit recipients of certain federal health funds from discriminating against any personnel “because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions” (42 U.S.C. 300a–7(b), (c)(1)). Later additions to the Church Amendments protect other conscientious objections, including some objections on the basis of moral conviction to “any lawful health service,” or to “any part of a health service program.” (42 U.S.C. 300a–7(c)(2), (d)). In contexts covered by those sections of the Church Amendments, the provision or coverage of certain contraceptives, depending on the cir-

cumstances, could constitute “any lawful health service” or a “part of a health service program.” As such, the protections provided by those provisions of the Church Amendments would encompass moral objections to contraceptive services or coverage.

The Church Amendments were enacted in the wake of the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973). Although the Court in *Roe* required abortion to be legal in certain circumstances, *Roe* did not include, within that right, the requirement that other citizens facilitate its exercise. Indeed, *Roe* favorably quoted the proceedings of the American Medical Association House of Delegates 220 (June 1970), which declared, “Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.” 410 U.S. at 144 & n.38 (1973). Likewise, in *Roe*’s companion case, *Doe v. Bolton*, the Court observed that, under state law, “a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.” 410 U.S. 179, 197–98 (1973). The Court said that these conscience provisions “obviously . . . afford appropriate protection.” *Id.* at 198. As an Arizona court later put it, “a woman’s right to an abortion or to contraception does not compel a private person or entity to facilitate either.” *Planned Parenthood Ariz., Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 196 (Ariz. Ct. App. 2011).

The Congressional Record contains discussions that occurred when the protection for moral convictions was first proposed in the Church Amendments. When Senator Church introduced the first of those amendments in 1973, he cited not only *Roe v. Wade*, but also an instance where a federal court had ordered a Catholic hospital to perform sterilizations. 119 Congr. Rec. S5717–18 (Mar. 27, 1973). After his opening remarks, Senator Adlai Stevenson III (D-IL) rose to ask that the amendment be changed to specify that it also protects objections to abortion and

<sup>136</sup>The Departments also note that, in protecting those individual and institutional health care entities that object to certain abortion-related services and activities regardless of the basis for such objection, the Coats-Snowe Amendment, PHS Act section 245 (42 U.S.C. 238n), and the Weldon Amendment, Consolidated Appropriations Act, 2018, Div. H, Sec. 507(d), Pub. L. No. 115-141, protect those whose objection is based on moral conviction.



sterilization based on moral convictions on the same terms as it protects objections based on religious beliefs. The following excerpt of the Congressional Record records this discussion:

Mr. STEVENSON. Mr. President, first of all I commend the Senator from Idaho for bringing this matter to the attention of the Senate. I ask the Senator a question.

One need not be of the Catholic faith or any other religious faith to feel deeply about the worth of human life. The protections afforded by this amendment run only to those whose religious beliefs would be offended by the necessity of performing or participating in the performance of certain medical procedures; others, for moral reasons, not necessarily for any religious belief, can feel equally as strong about human life. They too can revere human life.

As mortals, we cannot with confidence say, when life begins. But whether it is life, or the potentiality of life, our moral convictions as well as our religious beliefs, warrant protection from this intrusion by the Government. Would, therefore, the Senator include moral convictions?

Would the Senator consider an amendment on page 2, line 18 which would add to religious beliefs, the words “or moral”?

Mr. CHURCH. I would suggest to the Senator that perhaps his objective could be more clearly stated if the words “or moral conviction” were added after “religious belief.” I think that the Supreme Court in considering the protection we give religious beliefs has given comparable treatment to deeply held moral convictions. I would not be averse to amending the language of the amendment in such a manner. It is consistent with the general purpose. I see no reason why a deeply held moral conviction ought not be given the same treatment as a religious belief.

Mr. STEVENSON. The Senator’s suggestion is well taken. I thank him.

119 Congr. Rec. S5717–18.

As the debate proceeded, Senator Church went on to quote *Doe v. Bolton*’s reliance on a Georgia statute that stated “a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion pro-

cedure.” 119 Congr. Rec. S5722 (quoting 410 U.S. at 197–98). Senator Church added, “I see no reason why the amendment ought not also to cover doctors and nurses who have strong moral convictions against these particular operations.” *Id.* Considering the scope of the protections, Senator Gaylord Nelson (D-WI) asked whether, “if a hospital board, or whatever the ruling agency for the hospital was, a governing agency or otherwise, just capriciously—and not upon the religious or moral questions at all—simply said, ‘We are not going to bother with this kind of procedure in this hospital,’ would the pending amendment permit that?” 119 Congr. Rec. S5723. Senator Church responded that the amendment would not encompass such an objection. *Id.*

Senator James L. Buckley (C-NY), speaking in support of the amendment, added the following perspective:

Mr. BUCKLEY. Mr. President, I compliment the Senator from Idaho for proposing this most important and timely amendment. It is timely in the first instance because the attempt has already been made to compel the performance of abortion and sterilization operations on the part of those who are fundamentally opposed to such procedures. And it is timely also because the recent Supreme Court decisions will likely unleash a series of court actions across the United States to try to impose the personal preferences of the majority of the Supreme Court on the totality of the Nation.

I believe it is ironic that we should have this debate at all. Who would have predicted a year or two ago that we would have to guard against even the possibility that someone might be free [sic]<sup>137</sup> to participate in an abortion or sterilization against his will? Such an idea is repugnant to our political tradition. This is a Nation which has always been concerned with the right of conscience. It is the right of conscience which is protected in our draft laws. It is the right of conscience which the Supreme Court has quite properly expanded not only to embrace those young men who, because of the tenets of a particular faith, believe they cannot kill another man, but also those who because of

their own deepest moral convictions are so persuaded.

I am delighted that the Senator from Idaho has amended his language to include the words “moral conviction,” because, of course, we know that this is not a matter of concern to any one religious body to the exclusion of all others, or even to men who believe in a God to the exclusion of all others. It has been a traditional concept in our society from the earliest times that the right of conscience, like the paramount right to life from which it is derived, is sacred.

119 Congr. Rec. S5723.

In support of the same protections when they were debated in the U.S. House, Representative Margaret Heckler (R-MA)<sup>138</sup> likewise observed that “the right of conscience has long been recognized in the parallel situation in which the individual’s right to conscientious objector status in our selective service system has been protected” and “expanded by the Supreme Court to include moral conviction as well as formal religious belief.” 119 Congr. Rec. H4148–49 (May 31, 1973). Rep. Heckler added, “We are concerned here only with the right of moral conscience, which has always been a part of our national tradition.” *Id.* at 4149.

These first sections of the Church Amendments, codified at 42 U.S.C. 300a–7(b) and (c)(1), passed the House 372–1, and were approved by the Senate 94–0. 119 Congr. Rec. at H4149; 119 Congr. Rec. S10405 (June 5, 1973). The subsequently adopted provisions that comprise the Church Amendments similarly extend protection to those organizations and individuals who object to the provision of certain services on the basis of their moral convictions, as well as those who object to such services on the basis of religious beliefs. And, as noted above, subsequent statutes add protections for moral objections in many other situations. These include, for example:

- Protections for individuals and entities that object to abortion. *See* 42 U.S.C. 238n; 42 U.S.C. 18023; 42 U.S.C. 2996f(b); Consolidated Appropria-

<sup>137</sup>The Senator might have meant “[forced] . . . against his will.”

<sup>138</sup>Rep. Heckler later served as the 15th Secretary of HHS, from March 1983 to December 1985.

tions Act, 2018, Div. H, Sec. 507(d), Pub. L. No. 115–141.

- Protections for entities and individuals that object to providing or covering contraceptives. *See id.* at Div. E, Sec. 808; *id.* at Div. E, Sec. 726(c) (Financial Services and General Government Appropriations Act); *id.* at Div. K, Title III.
- Protections for entities and individuals that object to performing, assisting, counseling, or referring as pertains to suicide, assisted suicide, or advance directives. *See* 42 U.S.C. 290bb–36; 42 U.S.C. 1396a(w)(3); 42 U.S.C. 14406; 42 U.S.C. 18113 (adopted as part of the ACA).

The Departments believe that the intent behind Congress’s protection of moral convictions in certain health care contexts, especially to protect entities and individuals from governmental coercion, supports the Departments’ decision in the Moral IFC and these final rules to protect sincerely held moral convictions from governmental compulsion threatened by the contraceptive Mandate.

#### b. Court Precedents Relevant to These Expanded Exemptions

As reflected in the legislative history of the first Church Amendments, the Supreme Court has long afforded protection to moral convictions alongside religious beliefs. Indeed, Senator Church cited *Doe v. Bolton*, 410 U.S. 179, as a parallel instance of conscience protection and spoke of the Supreme Court generally giving “comparable treatment to deeply held moral convictions.” Both Senator Buckley and Rep. Heckler specifically cited the Supreme Court’s protection of moral convictions in laws governing military service. Those legislators appear to have been referencing cases such as *Welsh v. United States*, 398 U.S. 333 (1970), which

the Supreme Court had decided just three years earlier.

*Welsh* involved what is perhaps the Government’s paradigmatic compelling interest—the need to defend the nation by military force. The Court stated that, where the Government protects objections to military service based on “religious training and belief,” that protection would also extend to avowedly non-religious objections to war held with the same moral strength. *Id.* at 343. The Court declared, “[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a ‘religious’ conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.”

In the context of this particular Mandate, it is also worth noting that, in *Hobby Lobby*, Justice Ginsburg (joined, in this part of the opinion, by Justices Breyer, Kagan, and Sotomayor), cited Justice Harlan’s opinion in *Welsh*, 398 U.S. at 357–58, in support of her statement that “[s]eparating moral convictions from religious beliefs would be of questionable legitimacy.” 134 S. Ct. at 2789 n.6. In quoting this passage, the Departments do not mean to suggest that all laws protecting only religious beliefs constitute an illegitimate “separat[ion]” of moral convictions, nor do the Departments assert that moral convictions must always be protected alongside religious beliefs; we also do not agree with Justice Harlan that distinguishing between religious and moral objections would violate the Establishment Clause. Instead, the Departments believe that, in

the specific health care context implicated here, providing respect for moral convictions parallel to the respect afforded to religious beliefs is appropriate, draws from long-standing Federal Government practice, and shares common ground with Congress’s intent in the Church Amendments and in later federal statutes that provide protections for moral convictions alongside religious beliefs in other health care contexts.

#### c. Conscience Protections in Other Federal and State Contexts

The tradition of protecting moral convictions in certain health contexts is not limited to laws passed by Congress. Multiple federal regulations protect objections based on moral convictions in such contexts.<sup>139</sup> Other federal regulations have also applied the principle of respecting moral convictions alongside religious beliefs in particular circumstances. The Equal Employment Opportunity Commission has consistently protected “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views” alongside religious views under the “standard [] developed in *United States v. Seeger*, 380 U.S. 163 (1965) and [*Welsh*].” 29 CFR 1605.1. The Department of Justice has declared that, in cases of capital punishment, no officer or employee may be required to attend or participate if doing so “is contrary to the moral or religious convictions of the officer or employee, or if the employee is a medical professional who considers such participation or attendance contrary to medical ethics.” 28 CFR 26.5.<sup>140</sup>

Forty-five states have health care conscience protections covering objections to abortion; several of these also cover sterilization or contraception.<sup>141</sup> Most of those state laws protect objections based

<sup>139</sup>*See, for example*, 42 CFR 422.206 (declaring that the general Medicare Advantage rule “does not require the MA plan to cover, furnish, or pay for a particular counseling or referral service if the MA organization that offers the plan—(1) Objects to the provision of that service on moral or religious grounds.”); 42 CFR 438.102 (declaring that information requirements do not apply “if the MCO, PIHP, or PAHP objects to the service on moral or religious grounds”); 48 CFR 1609.7001 (“health plan sponsoring organizations are not required to discuss treatment options that they would not ordinarily discuss in their customary course of practice because such options are inconsistent with their professional judgment or ethical, moral or religious beliefs.”); 48 CFR 352.270-9 (“Non-Discrimination for Conscience” clause for organizations receiving HIV or Malaria relief funds).

<sup>140</sup>*See also* 18 CFR 214.11 (where a law enforcement agency (LEA) seeks assistance in the investigation or prosecution of trafficking of persons, the reasonableness of the LEA’s request will depend in part on “[c]ultural, religious, or moral objections to the request”).

<sup>141</sup>According to the Guttmacher Institute, 45 states have conscience statutes pertaining to abortion (43 of which cover institutions), 18 have conscience statutes pertaining to sterilization (16 of which cover institutions), and 12 have conscience statutes pertaining to contraception (8 of which cover institutions). “Refusing to Provide Health Services,” The Guttmacher Institute (June 1, 2017), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services>.

on “moral,” “ethical,” or “conscientious” grounds in addition to “religious” grounds. Particularly in the case of abortion, some federal and state conscience laws do not require any specified motive for the objection. 42 U.S.C. 238n; Consolidated Appropriations, 2018, Pub. L. 115–141, Div. H, section 507(d).

These various statutes and regulations reflect an important governmental interest in protecting moral convictions in appropriate health contexts. The contraceptive Mandate implicates that governmental interest. Many persons and entities object to the Mandate in part because they consider some forms of FDA-approved contraceptives to be morally equivalent to abortion due to the possibility that such items may prevent the implantation of a human embryo after fertilization.<sup>142</sup> The Supreme Court, in describing family business owners with religious objections, explained that “[t]he owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions.” *Hobby Lobby*, 134 S. Ct. at 2751. Based on pleadings in the litigation, all of the litigants challenging the Mandate and asserting purely non-religious objections share this view. And as Congress has implicitly recognized in providing health care conscience protections pertaining to sterilization, contraception, and other health care services and practices, individuals or entities may have additional moral objections to contraception.<sup>143</sup>

#### d. Founding Principles

The Departments also look to guidance from, and draw support for the Moral IFC and these final rules from, the broader

history of respect for conscience in the laws and founding principles of the United States. Members of Congress specifically relied on the American tradition of respect for conscience when they decided to protect moral convictions in health care. In supporting the protection of conscience based on non-religious moral convictions, Senator Buckley declared “[i]t has been a traditional concept in our society from the earliest times that the right of conscience, like the paramount right to life from which it is derived, is sacred.” Representative Heckler similarly stated that “the right of moral conscience . . . has always been a part of our national tradition.” This tradition is reflected, for example, in a letter President George Washington wrote saying that “the Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship.”<sup>144</sup> Thomas Jefferson similarly declared that “[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.”<sup>145</sup> Although these statements by Presidents Washington and Jefferson were spoken to religious congregations, and although religious and moral conscience were tightly intertwined for the Founders, they both reflect a broad principle of respect for conscience against government coercion. James Madison likewise called conscience “the most sacred of all property,” and proposed that the Bill of Rights should guarantee, in addition to protecting religious belief and worship, that “the full and equal rights of conscience [shall not] be in any manner, or on any pretext infringed.”<sup>146</sup>

These Founding Era statements of general principle do not specify how they would be applied in a particular health care context, and the Departments do not suggest that the specific protections offered in the Moral IFC and these final rules would be required or necessarily appropriate in any other context that does not raise the specific concerns implicated by this Mandate. These final rules do not address in any way how the Government would balance its interests with respect to other health services not encompassed by the contraceptive Mandate.<sup>147</sup> Instead, the Departments highlight this tradition of respect for conscience from the Nation’s Founding Era to provide background support for the Departments’ decision to implement section 2713(a)(4), while protecting conscience in the exercise of moral convictions. The Departments believe that these final rules are consistent both with the American tradition of respect for conscience and with Congress’s history of providing conscience protections in the kinds of health care matters involved in this Mandate.

#### e. Executive Orders Relevant to These Expanded Exemptions

Protecting moral convictions, as set forth in these expanded exemptions and accommodation in these final rules, is consistent with recent executive orders. President Trump’s Executive Order concerning this Mandate directed the Departments to consider providing protections, not specifically for “religious” beliefs, but for “conscience.” We interpret that term to include both religious beliefs and moral convictions. Moreover, President Trump’s first Executive Order, EO 13765, declared that “the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies

<sup>142</sup>FDA, “Birth Control,” U.S. Food and Drug Administration (Mar. 6, 2018), <https://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm> (various approved contraceptives, including Levonorgestrel, Ulipristal Acetate, and IUDs, work mainly by preventing fertilization, but “may also work . . . by preventing attachment (implantation) to the womb (uterus)” of a human embryo after fertilization).

<sup>143</sup>See *supra* note 1.

<sup>144</sup>Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790) (available at <https://founders.archives.gov/documents/Washington/05-06-02-0135>).

<sup>145</sup>Letter to the Society of the Methodist Episcopal Church at New London, Connecticut (February 4, 1809) (available at <https://founders.archives.gov/documents/Jefferson/99-01-02-9714>).

<sup>146</sup>James Madison, “Essay on Property” (March 29, 1792); First draft of the First Amendment, 1 Annals of Congress 434 (June 8, 1789).

<sup>147</sup>As the Supreme Court stated in *Hobby Lobby*, the Court’s decision concerns only the contraceptive Mandate, and should not be understood to hold that all insurance-coverage mandates, for example, for vaccinations or blood transfusions, must necessarily fail if they conflict with an employer’s religious beliefs. Nor does the Court’s opinion provide a shield for employers who might cloak illegal discrimination as a religious (or moral) practice. 134 S. Ct. at 2783.



(agencies) with authorities and responsibilities under the [ACA] shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any state or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.” The exemption and accommodation adopted in these final rules relieves a regulatory burden imposed on entities with moral convictions opposed to providing certain contraceptive coverage and is therefore consistent with both Executive Orders.

#### f. Litigation Concerning the Mandate

The Departments have further taken into consideration the litigation surrounding the Mandate in exercising their discretion to adopt the exemption in these final rules. Among the lawsuits challenging the Mandate, two have been filed based in part on non-religious moral convictions. In one case, the Departments are subject to a permanent injunction requiring us to respect the non-religious moral objections of an employer. *See March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015). In the other case, an appeals court affirmed a district court ruling that allows the previous regulations to be imposed in a way that affects the moral convictions of a small nonprofit pro-life organization and its employees. *See Real Alternatives v. Sec’y, Dep’t of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017). The Departments’ litigation of these cases has thus led to inconsistent court rulings, consumed substantial governmental resources, and created uncertainty for objecting organizations, issuers, third party administrators, and employees and beneficiaries. The organizations that have sued seeking a moral exemption have adopted longstanding moral tenets opposed to certain FDA-approved contraceptives, and hire only employees who share this view. As a result, it is reasonable to conclude that employees of these organizations would not benefit from the Mandate. Thus, subjecting this subset of organiza-

tions to the Mandate does not advance any governmental interest. The need to resolve this litigation and the potential concerns of similar entities, as well as the legal requirement to comply with permanent injunctive relief currently imposed in *March for Life*, provide substantial reasons for the Departments to protect moral convictions through these final rules. Although, as discussed below, the Departments assume the number of entities and individuals that may seek exemption from the Mandate on the basis of moral convictions, as these two sets of litigants did, will be small, the Departments know from the litigation that it will not be zero. As a result, the Departments have taken these types of objections into consideration in reviewing our regulations. Having done so, the Departments consider it appropriate to issue the protections set forth in these final rules. Just as Congress, in adopting the early provisions of the Church Amendments, viewed it as necessary and appropriate to protect those organizations and individuals with objections to certain health care services on the basis of moral convictions, so the Departments, too, believe that “our moral convictions as well as our religious beliefs, warrant protection from this intrusion by the Government” in this situation. *See* 119 Congr. Rec. S5717–18.

The litigation concerning the Mandate has also underscored how important it is for the Government to tread carefully when engaging in regulation concerning sensitive health care areas. As demonstrated by the litigation, as well as the public comments, various citizens sincerely hold moral convictions, which are not necessarily religious, against providing or participating in coverage of contraceptive items included in the Mandate, and some believe that certain contraceptive items may cause early abortions. Providing conscience protections advances the ACA’s goal of expanding health coverage among entities and individuals that might otherwise be reluctant to participate in the market. For example, the Supreme Court in *Hobby Lobby* declared that, if HHS requires owners of businesses to cover procedures that the owners “could not in good conscience” cover, such as abortion, “HHS would effectively exclude these people from full participation in the

economic life of the Nation.” 134 S. Ct. at 2783. That sort of outcome is one the Departments wish to avoid. The Departments wish to implement the contraceptive coverage Guidelines issued under section 2713(a)(4) in a way that respects the moral convictions of Americans so that they are freer to engage in “full participation in the economic life of the Nation.” The exemptions in these final rules do so by removing an obstacle that might otherwise lead entities or individuals with moral objections to contraceptive coverage to choose not to sponsor or participate in health plans if they include such coverage.

#### 3. Whether Moral Exemptions Should Exist, and Whom They Should Cover

As noted above, the Department received comments expressing diverse views as to whether exemptions based on moral convictions should exist and, if so, whom they should cover.

Some commenters supported the expanded exemptions and accommodation in the Moral IFC, and the choice of entities and individuals to which they applied. They stated the expanded exemptions and accommodation would be an appropriate exercise of discretion and would be consistent with moral exemptions Congress has provided in many similar contexts. Similarly, commenters stated that the accommodation would be an inadequate means to resolve moral objections and that the expanded exemptions are needed. They contended that the accommodation process was objectionable because it was another method of complying with the Mandate, its self-certification or notice involved triggering the very contraceptive coverage that organizations objected to, and the coverage for contraceptive services “hijacked” or flowed in connection with the objecting organizations’ health plans. The commenters contended that the seamlessness cited by the Departments between contraceptive coverage and an accommodated plan gives rise to moral objections that organizations would not have with an expanded exemption. Commenters also stated that, with respect to non-profit organizations that have moral objections and only hire persons who agree with those objections, the Mandate

serves no legitimate government interest because the mandated coverage is neither wanted nor used and, therefore, would yield no benefits—it would only suppress the existence of non-profit organizations holding those views.

Several other commenters stated that the exemptions were still too narrow. They asked that the exemptions set forth in these final rules be as broad as the exemptions set forth in the Religious IFC concerning sincerely held religious beliefs. Some of these commenters also asked that HHS withdraw its Mandate of contraceptive coverage from the Guidelines entirely. They contended that fertility and pregnancy are generally healthy conditions, not diseases that are appropriately the target of a preventive health service; that contraceptives can pose medical risks for women; and that studies do not show that contraceptive programs reduce abortion rates or unintended pregnancies. Some commented that many women report that they sought an abortion because their contraception failed. Some other commenters contended that, to the extent the Guidelines require coverage of certain drugs and devices that may prevent implantation of an embryo after fertilization, they require coverage of items that are abortifacient and, therefore, violate federal conscience protections such as the Weldon Amendment, Consolidated Appropriations Act, 2017, Pub. L. 115–31, Div. H, § 507(d).

Other commenters contended that the exemptions in the Moral IFC were too broad. Some of these commenters expressed concern about the prospect of publicly traded for-profit entities also being afforded a moral exemption. One such commenter commented that allowing publicly traded for-profit entities a moral exemption could cause instability and confusion, as leadership changes at such a corporation may effectively change the corporation's eligibility for a moral exemption. Still others stated that the Departments should not exempt various kinds of entities such as businesses, issuers, or nonprofit entities, arguing that only individuals, not entities, can possess moral convictions. Some commenters were concerned that providing moral ex-

emptions would contribute to population growth and related societal woes. Other commenters contended the exemptions and accommodation should not be expanded, but should remain the same as they were in the July 2015 final regulations (80 FR 41318), which did not encompass moral convictions. Other commenters stated that the Departments should not provide exemptions, but merely an accommodation process, to resolve moral objections to the Mandate.

Some commenters objected to providing any exemption or accommodation for moral objections at all. Some of these commenters contended that even the previous regulations allowing an exemption and accommodation were too broad and that no exemptions to the Mandate should exist, in order that contraceptive coverage would be provided to as many women as possible. Other commenters did not go that far, but rejected the idea of exemptions or an accommodation based on moral convictions, contending that such exemptions or accommodation would contribute to population growth and related social woes. Some of these commenters also contended that the exemption in the Moral IFC would constitute an exemption covering every business and non-profit organization.

After considering these comments, and although the previous Administration declined to afford any exemption based on moral convictions, the Departments have concluded that it is appropriate to provide moral exemptions and access to the accommodation, as set forth in these final rules. Congress did not mandate contraceptive coverage, nor provide any explicit guidance about incorporating conscience exemptions into the Guidelines. But as noted above, it is a long-standing Congressional practice to provide consistent exemptions for both religious beliefs and moral convictions in many federal statutes in the health care context, and specifically concerning issues such as abortion, sterilization, and contraception. It is not clear to the Departments that, if Congress had expressly mandated contraceptive coverage in the ACA, it would have done so without providing for similar exemptions. Therefore, the Departments consider it ap-

propriate, to the extent we impose a contraceptive Mandate by the exercise of agency discretion, that we also include an exemption for the protection of moral convictions in certain cases. The exemptions finalized in these final rules are generally consistent with the scope of exemptions that Congress has established in similar contexts. As noted above, the Departments consider the exemptions in these final rules consistent with the intent of Executive Order 13535. The Departments also wish to avoid the stark disparity that may result from respecting religious objections to providing contraceptive coverage among certain entities and individuals, but not respecting parallel objections for moral convictions possessed by any entities and individuals at all because those objections are not specifically religious.

In addition, the Departments note that a significant majority of states either impose no contraceptive coverage requirement or offer broader exemptions than the exemption contained in the July 2015 final regulations.<sup>148</sup> Although the practice of states is by no means a limit on the discretion delegated to HRSA by the ACA, nor a statement about what the Federal Government may do consistent with other limitations in federal law, such state practices can inform the Departments' view that it is appropriate to provide conscience protections when exercising agency discretion.

The Departments decline to use these final rules to remove the contraceptive Mandate altogether, such as by declaring that HHS acting through HRSA shall not include contraceptives in the list of women's preventive services in Guidelines issued under section 2713(a)(4). HRSA's Guidelines were not issued, ratified, or updated through the regulations that preceded the Moral IFC and these final rules. Those Guidelines were issued in separate processes in 2011 and 2016, directly by HRSA, after consultation with external organizations that operated under cooperative agreements with HRSA to consider the issue, solicit public comment, and provide recommendations. The regulations preceding these final rules attempted only to restate the statutory language of section 2713 in regulatory form, and delineate

<sup>148</sup>See "Insurance Coverage of Contraceptives," The Guttmacher Institute (June 11, 2018), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

what exemptions and accommodations would apply if HRSA listed contraceptives in its Guidelines. We decline to use these final rules to direct the separate process that HRSA uses to determine what specific services are listed in the Guidelines generally. Some commenters stated that if contraceptives are not removed from the Guidelines entirely, entities or individuals with moral objections might not qualify for the exemptions or accommodation. As discussed below, however, the exemptions in these rules include a broad range of entities and individuals of whom we have notice may object based on moral convictions. The Departments are not aware of specific employers or individuals whose moral convictions would still be violated by compliance with the Mandate after the issuance of the Moral IFC and these final rules.

Some commenters stated that HRSA should remove contraceptives from the Guidelines because the Guidelines have not been subject to the notice and comment process under the Administrative Procedure Act. Some commenters also contended that the Guidelines should be amended to omit items that may prevent (or possibly dislodge) the implantation of a human embryo after fertilization, in order to ensure consistency with conscience provisions that prohibit requiring plans to pay for or cover abortions. Whether and to what extent the Guidelines continue to list contraceptives, or items considered to prevent implantation of an embryo, for entities not subject to exemptions and an accommodation, and what process is used to include those items in the Guidelines, is outside the scope of these final rules. These final rules focus on what moral exemptions and accommodation shall apply if Guidelines issued under section 2713(a)(4) include contraceptives or items considered to be abortifacient.

Members of the public that support or oppose the inclusion of some or all contraceptives in the Guidelines, or wish to comment concerning the content and process of developing and updating the Guidelines, are welcome to communicate their views to HRSA, at [wellwomancare@hrsa.gov](mailto:wellwomancare@hrsa.gov).

The Departments also conclude that it would be inadequate to merely attempt to amend or expand the accommodation process to account for moral objectors, instead of providing the exemptions. In the past, the Departments stated in our regulations and court briefs that the previous accommodation required contraceptive coverage in a way that is “seamless” with the coverage provided by the objecting employer. As a result, in significant respects, the accommodation process did not actually accommodate the objections of many entities, as indicated by many entities with religious objections. The Departments have attempted to identify an accommodation that would eliminate the religious plaintiffs’ objections, including seeking public comment through a Request For Information, 81 FR 47741 (July 26, 2016), but stated in January 2017 that we were unable to develop such an approach at that time.<sup>149</sup> Just as the Departments continue to believe merely amending the accommodation process would not adequately address religious objections to compliance with the Mandate, we do not believe doing so would adequately address similar moral objections. Furthermore, the few litigants raising non-religious moral objections have been non-profit organizations that assert they only hire persons who share the employers’ objection to contraceptive coverage. Consequently, the Departments conclude that the most appropriate approach to resolve these concerns is to provide the exemptions set forth in the Moral IFC and these final rules. These final rules also finalize the modifications to the accommodation process to make it available to entities with moral objections, without forcing such entities to choose between compliance with either the Mandate or the accommodation.

Some commenters expressed concern over the lack of a definition of “moral convictions” in the Moral IFC, arguing that, without a definition, any objection could be encompassed by the exemptions even if it is not based on moral convictions. The Departments did not adopt a regulatory definition of “moral convictions” in the Moral IFC, and have decided not to adopt such a definition in response to public comments at this time. Nevertheless, the Departments look to the description of moral convictions in *Welsh* to help explain the scope of the protection provided in the Moral IFC and these final rules. Neither these final rules or the Moral IFC, nor the Church Amendments or other Federal health care conscience statutes, define “moral convictions” (nor do they define “religious beliefs”). But in issuing these final rules, we adopt the same background understanding of that term that is reflected in the Congressional Record in 1973, in which legislators referenced cases such as *Welsh* to support the addition of language protecting moral convictions. In protecting moral convictions in parallel to religious beliefs, *Welsh* describes moral convictions warranting such protection as ones: (1) that the “individual deeply and sincerely holds”; (2) “that are purely ethical or moral in source and content; (3) “but that nevertheless impose upon him a duty”; (4) and that “certainly occupy in the life of that individual a place parallel to that filled by . . . God’ in traditionally religious persons,” such that one could say “his beliefs function as a religion in his life.” 398 U.S. at 339–40. As recited above, Senators Church and Nelson agreed that protections for such moral convictions would not encompass an objection that an individual or entity raises “capriciously.” Instead, along with the requirement that protected moral convictions must be “sincerely held,” this understanding cabins the protection of moral convictions in contexts where they occupy a place parallel to that filled by sincerely held religious beliefs in religious persons and organizations.

While moral convictions are the sort of principles that, in the life of an individual, occupy a place parallel to religion, sincerely held moral convictions can also be adopted by corporate bodies, not merely by individuals. Senators Church and Nelson, while discussing the fact that opposition to abortion or sterilization on the basis of “moral questions” does not include capricious opposition to abortion for

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<sup>149</sup>See Departments of Labor, Health and Human Services, and the Treasury, FAQs About Affordable Care Act Implementation Part 36, (Jan. 9, 2017), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf> and [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36\\_1-9-17-Final.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part36_1-9-17-Final.pdf) (“the comments reviewed by the Departments in response to the RFI indicate that no feasible approach has been identified at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage”).



no reason at all, were specifically talking about opposition to abortion by corporate entities: a “hospital board, or whatever the ruling agency for the hospital was, a governing agency or otherwise.”<sup>150</sup> Corporate bodies operate by the decision-making actions of individuals. Thus, if individuals act in the governance of a corporate body so as to adopt a position for that body of adopting moral convictions against coverage of contraceptives, such an entity can be considered to have an objection to contraceptive coverage on the basis of sincerely held moral convictions.

#### 4. The Departments’ Rebalancing of Government Interests

The Departments also received comments on their rebalancing of interests as expressed and referenced in the Moral IFC. Some public commenters agreed with the Departments’ conclusion that our interest in ensuring contraceptive coverage does not preclude the Departments from offering exemptions and an accommodation for entities, plans, and individuals with a qualifying objection to contraceptive coverage based on moral convictions. Some public commenters pointed out that protecting moral convictions serves to respect not only the interests of certain persons to access contraceptives, but also the interests of other persons to participate in a health coverage market consistent with their moral convictions. Other commenters disagreed with this rebalancing, and contended that the interest of women in receiving contraceptive coverage without cost-sharing is so great that it overrides private interests to the contrary, such that the government should or must force private entities to provide this coverage to other private citizens.

The Departments agree with the commenters who stated that the governmental interest in requiring contraceptive coverage does not override the interest in protecting moral convictions and does not make these expanded exemptions inappropriate. For additional discussion of the Government’s balance of interests as ap-

plicable to religious beliefs, see section II.C.2.b. of the companion final rules concerning religious exemptions published by the Departments contemporaneously with these final rules elsewhere in today’s **Federal Register**. There, and in the Religious and Moral IFCs, the Departments acknowledged the reasons why the Departments have changed the policies and interpretations previously adopted with respect to the Mandate and the governmental interests underlying it. For parallel reasons, the Departments believe the Government’s legitimate interests in providing for contraceptive coverage do not require the Departments to violate sincerely held moral convictions while implementing the Guidelines. The Departments likewise believe Congress did not set forth interests that require us to violate sincerely held moral convictions if we otherwise require contraceptive coverage in our discretionary implementation of the women’s preventive services Guidelines under section 2713(a)(4).

The Departments acknowledge that coverage of contraception is an important and highly controversial issue, implicating many different views, as reflected for example in the public comments received on multiple rulemakings over the course of implementation of section 2713(a)(4), added to the PHS Act in 2010. The Departments’ expansion of conscience protections for moral convictions, similar to protections contained in numerous statutes governing health care regulation, is not taken lightly. However, after considering public comments on various sides of the issue, and reconsidering the interests served by the Mandate in this particular context, the objections raised, and the relevant federal law, the Departments have determined that affording the exemptions to protect moral convictions is a more appropriate administrative response than continuing to refuse to extend the exemptions and accommodations to certain entities and individuals for whom the Mandate violates their sincerely held moral

convictions. Although the number of organizations and individuals that may seek to invoke these exemptions and accommodation may be small, the Departments believe that it is important to provide such protection, given the long-standing recognition of such protections in law and regulation in the health care and health insurance contexts. The Moral IFC and these final rules leave unchanged HRSA’s authority to decide whether to include contraceptives in the women’s preventive services Guidelines for entities that are not exempted by law, regulation, or the Guidelines. These rules also do not change the many other mechanisms by which the Government advances contraceptive coverage, particularly for low-income women, including through such programs as Medicaid and Title X. The Departments also note that the exemptions created here, like the exemptions created by the previous Administration, do not burden third parties to a degree that counsels against providing the exemptions, as discussed below.

#### 5. Burdens on Third Parties

The Department received a variety of comments about the effect that the exemptions and accommodation based on moral convictions would have on third parties. Some commenters stated that the exemptions and accommodation do not impose an impermissible or unjustified burden on third parties, including on women who might otherwise receive contraceptive coverage with no cost sharing. Other commenters disagreed, asserting that the exemptions unacceptably burden women who might lose contraceptive coverage as a result. They contended the exemptions may remove contraceptive coverage, causing women to have higher contraceptive costs, fewer contraceptive options, less ability to use contraceptives more consistently, more unintended pregnancies,<sup>151</sup> births spaced more closely, and workplace, economic, or societal inequality. Still other commenters took the view

<sup>150</sup>Nor was this recognition of the need to protect organizations that object to performance of certain health care procedures on the basis of moral conviction limited to the Church Amendments’ legislative history. The first of the Church Amendments provides, in part, that the receipt of certain federal funds “by any individual or entity does not authorize any court or any public official or other public authority to require— . . . (2) such entity to—(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.” 42 U.S.C. 300a-7(b).

<sup>151</sup>Some commenters attempted to quantify the costs of unintended pregnancy, but were unable to provide estimates with regard to the number of women that this exemption may affect.

that other laws or protections, such as in the First or Fifth Amendments, prohibit the expanded exemptions, which those commenters view as prioritizing conscientious objection of exempted entities over the conscience, choices, or religious liberty of women who would not receive contraceptive coverage where an exemption is used. Some commenters disagreed and said the exemptions do not violate laws and constitutional protections, nor do they inappropriately prioritize the conscience of exempted entities over those of third parties.

The Departments note that the exemptions in the Moral IFC and these final rules, like the exemptions created by the previous Administration, do not impermissibly burden third parties. Initially, the Departments observe that these rules do not create a governmental burden; rather, they relieve a governmental burden. The ACA did not impose a contraceptive coverage requirement. Agency discretion was exercised to include contraceptives in the Guidelines issued under section 2713(a)(4). That decision is what created and imposed a governmental burden. These rules simply relieve part of that governmental burden. If some third parties do not receive contraceptive coverage from private parties whom the government chooses not to coerce, that result exists in the absence of governmental action—it is not a result the government has imposed. Calling that result a governmental burden rests on an incorrect presumption: that the government has an obligation to force private parties to benefit those third parties, and that the third parties have a right to those benefits. Congress did not create a right to receive contraceptive coverage from other private citizens through section 2713 of the PHS Act, other portions of the ACA, or any other statutes it has enacted. Although some commenters also contended such a right might exist under treaties the Senate has ratified or the Constitution, the Departments are not aware of any source demonstrating that the Constitution or a treaty ratified by the Senate creates a right to receive contraceptive coverage from other private citizens.

The fact that the government at one time exercised its administrative discre-

tion to require private parties to provide coverage to which they morally object, to benefit other private parties, does not prevent the government from relieving some or all of the burden of that Mandate. Otherwise, any governmental coverage requirement would be a one-way ratchet. In the Moral IFC and these final rules, the government has simply restored a zone of freedom where it once existed. There is no statutory or constitutional obstacle to the government doing so, and the doctrine of third party burdens should not be interpreted to impose such an obstacle. Such an interpretation would be especially problematic given the millions of women, in a variety of contexts, whom the Mandate does not ultimately benefit, notwithstanding any expanded exemptions—including through the grandfathering of plans, the previous religious exemptions, and the failure of the accommodation to require delivery of contraceptive coverage in various self-insured church plan contexts.

In addition, the Government is under no constitutional obligation to fund contraception. *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (holding that, although the Supreme Court has recognized a constitutional right to abortion, there is no constitutional obligation for government to pay for abortions). Even more so may the government refrain from requiring private citizens, in violation of their moral convictions, to cover contraception for other citizens. *Cf. Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”). The constitutional rights of liberty and privacy do not require the government to force private parties to provide contraception to other citizens and do not prohibit the government from protecting moral objections to such governmental mandates, especially where, as here, the Mandate is not an explicit statutory requirement.<sup>152</sup> The Departments do not believe that the Constitution prohibits offering the expanded exemptions in these rules.

Some commenters objected that the exemptions would violate the Establishment

Clause of the First Amendment. The Moral IFC and these final rules create exemptions for moral convictions, not religious beliefs, and they do so for the same neutral purposes for which Congress has created similar exemptions for over four decades. Not only do these final rules not violate the Establishment Clause, but the Departments’ decision to provide the exemptions and accommodation for moral convictions, instead of limiting the exemptions to identical objections based on religious beliefs, further demonstrates that neither the purpose nor the effect of these exemptions is to establish religion. The Establishment Clause does not force the Department to impose a contraceptive Mandate in violation of the moral convictions of entities and individuals protected by these rules.

American governmental bodies have, in many instances, refrained from requiring certain private parties to cover contraceptive services for other private parties. From 1789 through 2012 (when HRSA’s Guidelines went into effect), there was no federal women’s preventive services coverage mandate imposed nationally on health insurance and group health plans. The ACA did not require contraceptives to be included in HRSA’s Guidelines, and it did not require any preventive services required under section 2713 of the PHS Act to be covered by grandfathered plans. Many states do not impose contraceptive coverage mandates, or they offer religious, and in some cases moral, exemptions to the requirements of such coverage mandates—exemptions that have not been invalidated by federal or state courts. The Departments, in previous regulations, exempted houses of worship and integrated auxiliaries from the Mandate. The Departments then issued a temporary enforcement safe harbor allowing religious nonprofit groups to not provide contraceptive coverage under the Mandate for almost two additional years. The Departments further expanded the houses of worship and integrated auxiliaries exemption through definitional changes. And the Departments created an accommodation process under which many women in self-insured church plans may not ultimately

<sup>152</sup>See, for example, *Planned Parenthood Ariz., Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 196 (Ariz. Ct. App. 2011) (“[A] woman’s right to an abortion or to contraception does not compel a private person or entity to facilitate either.”).

receive contraceptive coverage. The Departments are not aware of federal courts declaring that the exemptions, safe harbor, or accommodations gave rise to third party burdens that required the government to mandate contraceptive coverage by entities eligible for an exemption or accommodation. In addition, many organizations have not been subject to the Mandate in practice because of injunctions they received through litigation, protecting them from federal imposition of the Mandate, including under several recently entered permanent injunctions that will apply regardless of the issuance of these final rules.

Commenters offered various assessments of the impact these rules might have on state or local governments. Some commenters stated that the expanded exemptions will not burden state or local governments, or that such burdens should not prevent the Departments from offering those exemptions. Others commenters stated that if the Departments provide expanded exemptions, states or local jurisdictions may face higher costs in providing birth control to women through government programs. The Departments consider it appropriate to offer expanded exemptions, notwithstanding the objection of some state or local governments. Until 2012, there was no federal mandate of contraceptive coverage across health insurance and health plans nationwide. The ACA did not require a contraceptive Mandate, and its discretionary creation by means of HRSA's Guidelines does not translate to a benefit that the federal government owes to state or local governments. The various situations recited in the previous paragraph, in which the federal government has not imposed contraceptive coverage, have not been deemed to cause a cognizable injury to state or local governments. The Departments find no legal prohibition on finalizing these final rules based on the allegation of an impact on state or local governments, and disagree with the suggestion that once having exercised our discretion to deny exemptions—no matter how recently or incompletely—the Departments cannot change course if some state and local gov-

ernments believe they are receiving indirect benefits from the previous decision.

In addition, the exemptions at issue here are available only to a tiny fraction of entities to which the Mandate would otherwise apply—those with qualifying moral objections. Public comments did not provide reliable data on how many entities would use these expanded moral exemptions, in which states women in those plans would reside, how many of those women would qualify for or use state and local government subsidies of contraceptives as a result, or in which states such women, if they are low income, would go without contraceptives and potentially experience unintended pregnancies that state Medicaid programs would potentially have to cover. As noted below, at least one study<sup>153</sup> has concluded the Mandate caused no clear increase in contraceptive use; one explanation proposed by the authors of the study is that women eligible for family planning from safety net programs were already receiving free or subsidized contraceptive access through them, notwithstanding the Mandate's effects on the overall market. Some commenters who opposed the exemptions admitted that this information is unclear at this stage; other commenters that estimated considerably more individuals and entities would seek an exemption also admitted the difficulty of quantifying estimates. In addition, the only entities that have brought suit based on their moral objections to the Mandate are non-profit entities that have said they only hire persons who share their objections and do not use the contraceptives to which their employers object, so it is unlikely that exemptions for those entities would have any impact on safety net programs. Below, we predict that a small number of additional nonprofit and closely held for-profit entities will use the exemptions based on moral convictions. In light of the limited evidence of third party or state and local government impact of these final rules, the Departments consider it an appropriate policy option to provide the exemptions.

Some commenters contended that the exemptions would constitute unlawful sex discrimination, such as under section 1557 of the Affordable Care Act, Title VII of the Civil Rights Act of 1964, Title IX of

the Education Amendments of 1972, or the Fifth Amendment. Some commenters suggested the expanded exemptions would discriminate on bases such as race, disability, or LGBT status, or that they would disproportionately burden certain persons in such categories.

But these rules do not discriminate or draw any distinctions on the basis of sex, pregnancy, race, disability, socio-economic class, LGBT status, or otherwise, nor do they discriminate on any unlawful grounds. The exemptions in these rules do not authorize entities to comply with the Mandate for one person, but not for another person, based on that person's status as a member of a protected class. Instead, they allow entities that have sincerely held moral objections to providing some or all contraceptives included in the Mandate to not be forced to provide coverage of those items to anyone.

Those commenters' contentions about discrimination are unpersuasive for still additional reasons. First, Title VII is applicable to discrimination committed by employers, and these final rules have been issued in the government's capacity as a regulator of group health plans and group and individual health insurance, not in its capacity as an employer. *See also In Re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 940–42 & n.1 (8th Cir. 2007) (holding that Title VII “does not require coverage of contraception because contraception is not a gender-specific term like potential pregnancy, but rather applies to both men and women”). Second, these rules create no disparate impact. The women's preventive service mandate under section 2713(a)(4), and the contraceptive Mandate promulgated under such preventive services mandate, already inure to the specific benefit of women—men are denied any benefit from section 2713(a)(4). Both before and after these rules are in effect, section 2713(a)(4) and the Guidelines issued under that section treat women's preventive services in general, and female contraceptives specifically, more favorably than they treat male preventive services or contraceptives.

It is simply not the case that the government's implementation of section 2713(a)(4) is discriminatory against

<sup>153</sup>M.L. Kavanaugh et al., “Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014,” 97 *Contraception* 14, 14–21 (2018), available at [http://www.contraceptionjournal.org/article/S0010-7824\(17\)30478-X/pdf](http://www.contraceptionjournal.org/article/S0010-7824(17)30478-X/pdf).



women because exemptions encompass moral objections. The previous rules, as discussed elsewhere herein, do not require contraceptive coverage in a host of plans, including grandfathered plans, plans of houses of worship and integrated auxiliaries, and—through inability to enforce the accommodation on certain third party administrators—plans of many religious non-profits in self-insured church plans. Below, the Departments estimate that nearly all women of childbearing age in the country will be unaffected by these exemptions. In this context, the Departments do not believe that an adjustment to discretionary Guidelines for women’s preventive services concerning contraceptives constitutes unlawful sex discrimination. Otherwise, anytime the government exercises its discretion to provide a benefit that is specific to women (or specific to men), it would constitute sex discrimination for the government to reconsider that benefit. Under that theory, *Hobby Lobby* itself, and RFRA (on which *Hobby Lobby*’s holding was based), which provided a religious exemption to this Mandate for many businesses, would be deemed discriminatory against women because the underlying women’s preventive services requirement is a benefit for women, not for men. Such conclusions are not consistent with legal doctrines concerning sex discrimination.

It is not clear that these expanded exemptions will significantly burden women most at risk of unintended pregnancies. Some commenters stated that contraceptives are often readily accessible at relatively low cost. Other commenters disagreed. Some commenters objected that the Moral IFC’s estimate of a \$584 yearly cost of contraceptives for women was too low. But some of those same commenters provided similar estimates, citing sources claiming that birth control pills can cost up to \$600 per year, and stated that IUDs, which can last 3 to 6 years or more,<sup>154</sup> can cost \$1,100 (that is, less than \$50 per month over the duration of use). Some commenters stated that, for lower income women, contraceptives and related education and counseling can be available at

free or low cost through government programs (federal programs offering such services include, for example, Medicaid, Title X, community health center grants, and Temporary Assistance for Needy Families (TANF)). Other commenters contended that many women in employer-sponsored coverage might not qualify for those programs, although that sometimes occurs because their incomes are above certain thresholds or because the programs were not intended to absorb privately covered individuals. Some commenters observed that contraceptives may be available through other sources, such as a plan of another family member, and that the expanded exemptions will not likely encompass a very large segment of the population otherwise benefitting from the Mandate. Other commenters disagreed, emphasizing that income and eligibility thresholds could prevent some women from receiving contraceptives through certain government programs if they were no longer covered in their group health plans or health insurance plans.

The Departments do not believe that such differences make it inappropriate to issue the expanded exemptions set forth in these rules. As explained more fully below, the Departments estimate that nearly all women of childbearing age in the country will be unaffected by these exemptions. Moreover, the Departments note that the HHS Office of Population Affairs, within the Office of the Assistant Secretary for Health, has recently issued a proposed rule to amend the regulations governing its Title X family planning program. The proposed rule would amend the definition of “low income family”—individuals eligible for free or low cost contraceptive services—to include women who are unable to obtain certain family planning services under their employer-sponsored health coverage due to their employers’ religious beliefs or moral convictions. (83 FR 25502). If that rule is finalized as proposed, it would further reduce any potential effect of these final rules on women’s access to contraceptives.

Some commenters stated that the expanded exemptions would violate section 1554 of the ACA. That section says the

Secretary of HHS “shall not promulgate any regulation” that “creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care,” “impedes timely access to health care services,” “interferes with communications regarding a full range of treatment options between the patient and the provider,” “restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions,” “violates the principles of informed consent and the ethical standards of health care professionals,” or “limits the availability of health care treatment for the full duration of a patient’s medical needs.” 42 U.S.C. 18114. Such commenters urged, for example, that the Moral IFC created unreasonable barriers to the ability of individuals to obtain appropriate medical care, particularly in areas they said may have a disproportionately high number of entities likely to take advantage of the exemption.

The Departments disagree with these comments about section 1554 of the ACA. The Departments issued previous exemptions and accommodations that allowed various plans to not provide contraceptive coverage on the basis of religious objections; multiple courts considered those regulations; and while many ruled that entities did not need to provide contraceptive coverage, none ruled that the exemptions or accommodations in the regulations violated section 1554 of the ACA. Moreover, the decision not to impose a governmental mandate is not the creation of a “barrier,” especially when that mandate requires private citizens to provide services to other private citizens. This would turn the assumptions of the United States’ system of government on its head. *See, for example*, U.S. Constitution, Ninth Amendment. Section 1554 of the ACA likewise does not require the Departments to require coverage of, or to keep in place a requirement to cover, certain services, including contraceptives, that was issued pursuant to HHS’s exercise of discretion under section 2713(a)(4). Nor does section 1554 of the ACA prohibit the Departments from providing exemptions to relieve burdens on moral convictions, or as is the case here, from refraining to impose

<sup>154</sup>*See, for example*, “IUD,” Planned Parenthood, <https://www.plannedparenthood.org/learn/birth-control/iud>.

the Mandate in cases where moral convictions would be burdened by the Mandate. Moral exemptions from federal mandates in certain health contexts, including sterilization, contraception, or items believed to be abortifacient, have existed in federal laws for decades. Some of those laws were referenced by President Obama in signing Executive Order 13535. In light of that Executive Order and Congress's long history of providing exemptions for moral convictions in the health context, providing moral exemptions is a reasonable administrative response to this federally mandated burden, especially since the burden itself is a subregulatory creation that does not apply in various contexts.

In short, we do not believe sections 1554 or 1557 of the ACA, other nondiscrimination statutes, or any constitutional doctrines, create an affirmative obligation to create, maintain, or impose a Mandate that forces covered entities to provide coverage of preventive contraceptive services in health plans. The ACA's grant of authority to HRSA to provide for, and support, the Guidelines is not transformed by any of the laws cited by commenters into a requirement that, once those Guidelines exist, they can never be reconsidered, or amended because doing so would only affect women's coverage or would allegedly impact particular populations disparately.

In summary, members of the public have widely divergent views on whether the exemptions in the Moral IFC and these final rules are good public policy. Some commenters stated that the exemptions would burden workers, families, and the economic and social stability of the country, and interfere with the physician-patient relationship. Other commenters disagreed, favoring the public policy behind the exemption, and arguing that the exemption would not interfere with the physician-patient relationship. The Departments have determined that these final

rules are an appropriate exercise of public policy discretion. Because of the importance of the moral convictions being accommodated, the limited impact of these final rules, and uncertainty about the impact of the Mandate overall according to some studies, the Departments do not believe these final rules will have any of the drastic negative consequences on third parties or society that some opponents of these rules have suggested.

## 6. Interim Final Rulemaking

The Departments received several comments about the decision to issue the Moral IFC as interim final rules with request for comments, instead of as a notice of proposed rulemaking. Several commenters asserted that the Departments had the authority to issue the Moral IFC in that way, agreeing with the Departments that there was explicit statutory authority to do so, good cause under the APA, or both. Other commenters held the opposite view, contending that there was neither statutory authority to issue the rules on an interim final basis, nor good cause under the APA to make the rules immediately effective.

The Departments continue to believe authority existed to issue the Moral IFC as interim final rules. Section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act authorize the Secretaries of the Treasury, Labor, and HHS (collectively, the Secretaries) to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include sections 2701 through 2728 of that Act, and the incorporation of those sections into section 715 of ERISA and section 9815 of the Code. The Religious and Moral IFCs fall under those statutory authorizations for the use of interim final rulemaking. Prior to the Moral IFC, the

Departments issued three interim final regulations implementing this section of the PHS Act because of the needs of covered entities for immediate guidance and the weighty matters implicated by the HRSA Guidelines, including issuance of new or revised exemptions or accommodations. (75 FR 41726; 76 FR 46621; 79 FR 51092). The Departments also had good cause to issue the Moral IFC as interim final rules, for the reasons discussed therein.

In any event, the objections of some commenters to the issuance of the Moral IFC as interim final rules with request for comments does not prevent the issuance of these final rules. These final rules were issued after receiving and thoroughly considering public comments as requested in the Moral IFC. These final rules therefore comply with the APA's notice and comment requirements.

## 7. Health Effects of Contraception and Pregnancy

The Departments received numerous comments on the health effects of contraception and pregnancy. As noted above, some commenters supported the expanded exemptions, and others urged that contraceptives be removed from the Guidelines entirely, based on the view that pregnancy and the unborn children resulting from conception are not diseases or unhealthy conditions that are properly the subject of preventive care coverage. Such commenters further contended that hormonal contraceptives may present health risks to women. For example, they contended that studies show certain contraceptives cause, or are associated with, an increased risk of depression,<sup>155</sup> venous thromboembolic disease,<sup>156</sup> fatal pulmonary embolism,<sup>157</sup> thrombotic stroke and myocardial infarction (particularly among women who smoke, are hypertensive, or are older),<sup>158</sup> hypertension,<sup>159</sup> HIV-1 acquisition and

<sup>155</sup>Commenters cited Charlotte Wessel Skovlund, et al., "Association of Hormonal Contraception with Depression," *JAMA Psychiatry* 1154, 1154 (published online Sept. 28, 2016) ("Use of hormonal contraception, especially among adolescents, was associated with subsequent use of antidepressants and a first diagnosis of depression, suggesting depression as a potential adverse effect of hormonal contraceptive use.").

<sup>156</sup>Commenters cited the Practice Committee of the American Society for Reproductive Medicine, "Hormonal Contraception: Recent Advances and Controversies," 82 *Fertility and Sterility* S26, S30 (2004); V.A. Van Hylckama et al., "The Venous Thrombotic Risk of Oral Contraceptives, Effects of Estrogen Dose and Progestogen Type: Results of the MEGA Case-Control Study," 339 *Brit. Med. J.* b2921 (2009); Y. Vinogradova et al., "Use of Combined Oral Contraceptives and Risk of Venous Thromboembolism: Nested Case-Control Studies Using the QResearch and CPRD Databases," 350 *Brit. Med. J.* h2135 (2015) ("Current exposure to any combined oral contraceptive was associated with an increased risk of venous thromboembolism . . . compared with no exposure in the previous year."); Ø. Lidegaard et al., "Hormonal contraception and risk of venous thromboembolism: national follow-up study," 339 *Brit. Med. J.* b2890 (2009); M. de Bastos et al., "Combined oral contraceptives: venous thrombosis," *Cochrane Database Syst. Rev.*, Mar. 3, 2014. doi: 10.1002/14651858.CD010813.pub2, available at <https://www.ncbi.nlm.nih.gov/pubmed?term=24590565>; L.J. Havrilesky et al., "Oral Contraceptive User for the Primary Prevention of Ovarian Cancer," Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013), available at <https://archive.ahrq.gov/research/findings/evidence-based-reports/ocusetp.html>; and Robert A. Hatcher et al., *Contraceptive*

transmission,<sup>160</sup> and breast, cervical, and liver cancers.<sup>161</sup> Some commenters also stated that fertility awareness based methods of birth spacing are free of similar health risks since they do not involve ingestion of chemicals. Some commenters contended that it is not the case that contraceptive access reduces unintended pregnancies or abortions.

Other commenters disagreed, citing a variety of studies they contend show health benefits caused by, or associated with, contraceptive use or the prevention of unintended pregnancy. Commenters cited, for example, the 2011 Report of the Institute of Medicine (IOM), “Clinical Preventive Services for Women: Closing the Gaps,” in its discussion of the negative effects associated with unintended pregnancies, as well as other studies. Such commenters contended that, by reducing unintended pregnancy, contraceptives reduce the risk of unaddressed health complications, low birth weight, preterm birth, infant mortality, and maternal mortality. Commenters also stated that studies show contraceptives are associated with a reduced risk of conditions such as ovarian cancer, colorectal cancer, and endometrial cancer, and that contraceptives treat such conditions as endometriosis, polycystic ovarian syndrome, migraines, pre-menstrual pain, menstrual regulation, and pelvic inflammatory disease.<sup>162</sup> Some commenters stated that pregnancy presents various health risks, such as blood clots, bleeding,

anemia, high blood pressure, gestational diabetes, and death. Some commenters also contended that increased access to contraception reduces abortions.

Some commenters stated that, in the Moral IFC, the Departments relied on incorrect statements concerning scientific studies. For example, some commenters stated that there is no proven increased risk of breast cancer or other risks among contraceptive users. They criticized the Departments for citing studies, including one previewed in the 2011 IOM Report itself (Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013) (cited above)), discussing an association between contraceptive use and increased risks of breast and cervical cancer, and concluding there are no net cancer-reducing benefits of contraceptive use. As described in the Religious IFC, 82 FR 47804, the 2013 Agency for Healthcare Research and Quality study, and other sources, reach conclusions with which these commenters appear to disagree. The Departments consider it appropriate to consider these studies, as well as the studies cited by commenters who disagree with those conclusions.

Some commenters further criticized the Departments for saying two studies cited by the 2011 IOM Report, which asserted an associative relationship between contraceptive use and decreases in unintended pregnancy, did not on their face establish a causal relationship be-

tween a broad coverage mandate and decreases in unintended pregnancy. In this respect, as noted in the Religious IFC,<sup>163</sup> the purpose for the Departments’ reference to such studies was to highlight the difference between a causal relationship and an associative one, as well as the difference between saying contraceptive use has a certain effect and saying a contraceptive coverage mandate (or part of that mandate affected by certain exemptions) will necessarily have (or negate, respectively) such an effect.

Commenters disagreed about the effects of some FDA-approved contraceptives on embryos. Some commenters agreed with the quotation, in the Moral IFC, of FDA materials<sup>164</sup> that indicate that some items it has approved as contraceptives may prevent the implantation of an embryo after fertilization. Some of those commenters cited additional scientific sources to argue that certain approved contraceptives may prevent implantation, and that, in some cases, some contraceptive items may even dislodge an embryo shortly after implantation. Other commenters disagreed with the sources cited in the Moral IFC and cited additional studies on that issue. Some commenters further criticized the Departments for asserting in the Moral IFC that some persons believe those possible effects are “abortifacient.”

This objection on this issue appears to be partially one of semantics. People dis-

*Technology*, 405–07 (Ardent Media 18th rev. ed. 2004).

<sup>157</sup>Commenters cited N.R. Poulter, “Risk of Fatal Pulmonary Embolism with Oral Contraceptives,” 355 *Lancet* 2088 (2000).

<sup>158</sup>Commenters cited Ø. Lidegaard et al., “Thrombotic Stroke and Myocardial Infarction with Hormonal Contraception,” 366 *N. Engl. J. Med.* 2257, 2257 (2012) (risks “increased by a factor of 0.9 to 1.7 with oral contraceptives that included ethinyl estradiol at a dose of 20 µg and by a factor of 1.3 to 2.3 with those that included ethinyl estradiol at a dose of 30 to 40 µg”); Practice Committee of the American Society for Reproductive Medicine, “Hormonal Contraception”; M. Vessey et al., “Mortality in Relation to Oral Contraceptive Use and Cigarette Smoking,” 362 *Lancet* 185, 185–91 (2003); WHO Collaborative Study of Cardiovascular Disease and Steroid Hormone Contraception, “Acute Myocardial Infarction and Combined Oral Contraceptives: Results of an International Multicentre Case-Control Study,” 349 *Lancet* 1202, 1202–09 (1997); K.M. Curtis et al., “Combined Oral Contraceptive Use Among Women With Hypertension: A Systematic Review,” 73 *Contraception* 179, 179–188 (2006); L.A. Gillum et al., “Ischemic stroke risk with oral contraceptives: A meta analysis,” 284 *JAMA* 72, 72–78 (2000), available at <https://www.ncbi.nlm.nih.gov/pubmed/10872016>; and Robert A. Hatcher et al., *Contraceptive Technology*, 404–05, 445 (Ardent Media 18th rev. ed. 2004).

<sup>159</sup>Commenters cited Robert A. Hatcher et al., *Contraceptive Technology*, 407, 445 (Ardent Media 18th rev. ed. 2004).

<sup>160</sup>Commenters cited Renee Heffron et al., “Use of Hormonal Contraceptives and Risk of HIV-1 Transmission: A Prospective Cohort Study,” 12 *Lancet Infectious Diseases* 19, 24 (2012) (“Use of hormonal contraceptives was associated with a two-times increase in the risk of HIV-1 acquisition by women and HIV-1 transmission from women to men.”); and “Hormonal Contraception Doubles HIV Risk, Study Suggests,” *Science Daily* (Oct. 4, 2011), <https://www.sciencedaily.com/releases/2011/10/111003195253.htm>.

<sup>161</sup>Commenters cited “Oral Contraceptives and Cancer Risk,” National Cancer Institute (Mar. 21, 2012), <https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/oral-contraceptives-fact-sheet>; L.J. Havrilesky et al., “Oral Contraceptive User for the Primary Prevention of Ovarian Cancer,” Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013), available at <https://archive.ahrq.gov/research/findings/evidence-based-reports/ocusetp.html>; S. N. Bhupathiraju et al., “Exogenous hormone use: Oral contraceptives, postmenopausal hormone therapy, and health outcomes in the Nurses’ Health Study,” 106 *Am. J. Pub. Health* 1631, 1631–37 (2016); The World Health Organization Department of Reproductive Health and Research, “Carcinogenicity of Combined Hormonal Contraceptives and Combined Menopausal Treatment,” (Sept. 2005), available at [http://www.who.int/reproductivehealth/topics/ageing/cocs\\_hrt\\_statement.pdf](http://www.who.int/reproductivehealth/topics/ageing/cocs_hrt_statement.pdf); and the American Cancer Society, “Known and Probably Human Carcinogens,” American Cancer Society (rev. Nov. 3, 2016), <https://www.cancer.org/cancer/cancer-causes/general-info/known-and-probable-human-carcinogens.html>.

<sup>162</sup>To the extent that contraceptives are prescribed to treat health conditions, and not for preventive purposes, the Mandate would not be applicable.

<sup>163</sup>82 FR at 47803–04.

<sup>164</sup>FDA’s guide “Birth Control” specifies that various approved contraceptives, including Levonorgestrel, Ulipristal Acetate, and IUDs, work mainly by preventing fertilization and “may also work ... by preventing attachment (implantation) to the womb (uterus)” of a human embryo after fertilization. Available at <https://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm>.



agree about whether to define “conception” or “pregnancy” to occur at fertilization, when the sperm and ovum unite, or days later at implantation, when that embryo has undergone further cellular development, travelled down the fallopian tube, and implanted in the uterine wall. This question is independent of the question of what mechanisms of action FDA-approved or cleared contraceptives may have. It is also a separate question from whether members of the public assert, or believe, that it is appropriate to consider the items “abortifacient”—that is, a kind of abortion, or a medical product that causes an abortion—because they believe abortion means to cause the demise of a post-fertilization embryo inside the mother’s body. Commenters referenced scientific studies and sources on both sides of the issue of whether certain contraceptives prevent implantation. Commenters and litigants have positively stated that some of them view certain contraceptives as abortifacients, for this reason. *See also Hobby Lobby*, 134 U.S. at 2765 (“The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.”).

The Departments do not take a position on the scientific, religious, or moral debates on this issue by recognizing that some people have sincere moral objections to providing contraception coverage on this basis. The Supreme Court has already recognized that such a view can form the basis of an objection based on sincerely held religious belief under RFRA.<sup>165</sup> Several litigants have separately raised non-religious moral objec-

tions to contraceptive coverage based on the same basic rationale. Even though there is a plausible scientific argument against the view that certain contraceptives have mechanisms of action that may prevent implantation, there is also a plausible scientific argument in favor of it—as demonstrated, for example, by FDA’s statement that some contraceptives may prevent implantation and by some scientific studies cited by commenters. The Departments believe in this context we have a sufficient rationale to offer moral exemptions with respect to this Mandate.

The Departments also received comments about their discussion, located in the Religious IFC but partly relied upon in the Moral IFC, concerning uncertainty about the effects the Mandate’s expanded exemptions might have on teen sexual activity. In this respect, the Departments stated, “With respect to teens, the Santelli and Melnikas study cited by IOM 2011 observes that, between 1960 and 1990, as contraceptive use increased, teen sexual activity outside of marriage likewise increased (although the study does not assert a causal relationship). Another study, which proposed an economic model for the decision to engage in sexual activity, stated that “[p]rograms that increase access to contraception are found to decrease teen pregnancies in the short run but increase teen pregnancies in the long run.”<sup>166</sup> Some commenters agreed with this discussion, while other commenters disagreed. Commenters who supported the expanded exemptions cited these and similar sources suggesting that limiting the exemptions to the Mandate to those that existed prior to the Religious and Moral IFCs is not tailored towards ad-

vancing the Government’s interests in reducing teen pregnancy. Instead they suggested there are means of reducing teen pregnancy that are less burdensome on conscientious objections.<sup>167</sup> Some commenters opposing the expanded exemptions stated that school-based health centers provide access to contraceptives, thus increasing use of contraceptives by sexually active students. They also cited studies concluding that certain decreases in teen pregnancy are attributable to increased contraceptive use.<sup>168</sup>

Many commenters opposing the moral exemptions misunderstood the Departments’ discussion of this issue. Teens are a significant part, though not the entirety, of women the IOM identified as being most at risk of unintended pregnancy. The Departments do not take a position on the empirical question of whether contraception has caused certain reductions in teen pregnancy. Rather, the Departments note that studies suggesting various causes of teen pregnancy and unintended pregnancy in general make it difficult to establish causation between exemptions to the contraceptive Mandate, and an increase in teen pregnancies in particular, or unintended pregnancies in general. For example, a 2015 study investigating the decline in teen pregnancy since 1991 attributed it to multiple factors (including, but not limited to, reduced sexual activity, falling welfare benefit levels, and expansion of family planning services in Medicaid, with the latter accounting for less than 13 percent of the decline). It concluded that “that none of the relatively easy, policy-based explanations for the recent decline in teen childbearing in the United States hold up very well to careful empirical

<sup>165</sup>“Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. See Brief for HHS in No. 13–354, pp. 9–10, n. 4; FDA, Birth Control: Medicines to Help You.” *Hobby Lobby*, 134 S. Ct. at 2762–63. “The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. . . . Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.” *Id.* at 2765–66.

<sup>166</sup>Citing J.S. Santelli & A.J. Melnikas, “Teen fertility in transition: recent and historic trends in the United States,” 31 *Ann. Rev. Pub. Health* 371, 375–76 (2010), and Peter Arcidiacono et al., *Habit Persistence and Teen Sex: Could Increased Access to Contraception Have Unintended Consequences for Teen Pregnancies?* (2005), available at <http://public.econ.duke.edu/~psarcidi/addicted13.pdf>. *See also* K. Buckles & D. Hungerman, “The Incidental Fertility Effects of School Condom Distribution Programs,” *Nat’l Bureau of Econ. Research Working Paper No. 22322* (June 2016), available at <http://www.nber.org/papers/w22322> (“access to condoms in schools increases teen fertility by about 10 percent” and increased sexually transmitted infections).

<sup>167</sup>*See* Helen Alvaré, “No Compelling Interest: The ‘Birth Control’ Mandate and Religious Freedom,” 58 *Vill. L. Rev.* 379, 400–02 (2013) (discussing the Santelli & Melnikas study and the Arcidiacono study cited above, and other research that considers the extent to which reduction in teen pregnancy is attributable to sexual risk avoidance rather than to contraception access).

<sup>168</sup>*See, e.g.*, Lindberg L., Santelli J., “Understanding the Decline in Adolescent Fertility in the United States, 2007–2012,” 59 *J. Adolescent Health* 577–83 (Nov. 2016), <https://doi.org/10.1016/j.jadohealth.2016.06.024>; *see also* Comment of The Colorado Health Foundation, submission ID CMS-2014-0115-19635, [www.regulations.gov](http://www.regulations.gov) (discussing teen pregnancy data from Colorado).

scrutiny.”<sup>169</sup> One study found that, during the teen pregnancy decline between 2007 through 2012, teen sexual activity was also decreasing.<sup>170</sup> One study concluded that falling unemployment rates in the 1990s accounted for 85 percent of the decrease in rates of first births among 18 to 19 year-old African Americans.<sup>171</sup> Another study found that the representation of African-American teachers was associated with a significant reduction in the African-American teen pregnancy rate.<sup>172</sup> One study concluded that an “increase in the price of the Pill on college campuses . . . did not increase the rates of unintended pregnancy.”<sup>173</sup> Similarly, one study from England found that, where funding for teen pregnancy prevention was reduced, there was no evidence that the reduction led to an increase in teen pregnancies.<sup>174</sup> Some commenters also cited studies—which are not limited to the issue of teen pregnancy—that have found that many women who have abortions report that they were using contraceptives when they became pregnant.<sup>175</sup>

As the Departments stated in the Religious IFC, we do not take a position on the variety of empirical questions discussed above. Likewise, these rules do not address the substantive question of whether HRSA should include contraceptives in the women’s preventive services Guidelines issued under section 2713(a)(4). Rather, reexamination of the record and review of public comments has reinforced the Departments’ view that the uncertainty surrounding these weighty and important issues makes it appropriate to provide the moral exemptions and accommodation if and for as long as

HRSA continues to include contraceptives in the Guidelines. The federal government has a long history, particularly in certain sensitive and multi-faceted health issues, of providing moral exemptions from governmental mandates. These final rules are consistent with that history and with the discretion Congress vested in the Departments to implement the ACA.

## 8. Health and Equality Effects of Contraceptive Coverage Mandates

The Departments also received comments about the health and equality effects of the Mandate more broadly. Some commenters contended that the contraceptive Mandate promoted the health and equality of women, especially low income women, and promoted female participation and equality in the workforce. Other commenters contended there was insufficient evidence showing that the expanded exemptions would harm those interests. Some of those commenters further questioned whether there was evidence to show that broad health coverage mandates of contraception lead to increased contraceptive use, reductions in unintended pregnancies, or reductions in negative effects said to be associated with unintended pregnancies. In particular, some commenters discussed a study published and revised by the Guttmacher Institute in October 2017, concluding that “[b]etween 2008 and 2014, there were no significant changes in the overall proportion of women who used a contraceptive method both among all women and among women

at risk of unintended pregnancy.”<sup>176</sup> This timeframe includes the first two years of the contraceptive Mandate’s implementation. Despite some changes in the use of various methods of contraceptives, the study concluded that, “[f]or the most part, women are changing method type within the group of most or moderately effective methods and not shifting from less effective to more effective methods.” Regarding the effect of this Mandate in particular, the authors concluded that “[t]he role that the contraceptive coverage guarantee played in impacting use of contraception at the national level remains unclear, as there was no significant increase in the use of methods that would have been covered under the ACA (most or moderately effective methods) during the most recent time period (2012–2014) excepting small increases in implant use.” The authors observed that other “[s]tudies have produced mixed evidence regarding the relationship between the implementation of the ACA and contraceptive use patterns.” In explaining some possible reasons or no clear effect on contraceptive use, the authors suggested that “existence of these safety net programs [publicly funded family planning centers and Medicaid] may have dampened any impact that the ACA could have had on contraceptive use,” “cost is not the only barrier to accessing a full range of method options,” and “access to affordable and/or free contraception made possible through programs such as Title X” may have led to income not being associated with the use of most contraceptive methods.<sup>177</sup> In addition, commenters

<sup>169</sup>Kearney MS and Levine PB, “Investigating recent trends in the U.S. birth rate,” 41 *J. Health Econ.* 15–29 (2015), available at <https://www.sciencedirect.com/science/article/abs/pii/S0167629615000041>.

<sup>170</sup>See, e.g., K. Ethier et al., “Sexual Intercourse Among High School Students—29 States and United States Overall, 2005–2015,” 66 *CDC Morb. Mortal. Wkly Report* 1393, 1393–97 (Jan. 5, 2018), available at <http://dx.doi.org/10.15585/mmwr.mm66512a1> (“Nationwide, the proportion of high school students who had ever had sexual intercourse decreased significantly overall . . .”).

<sup>171</sup>Colen CG, Geronimus AT, and Phipps MG, “Getting a piece of the pie? The economic boom of the 1990s and declining teen birth rates in the United States,” 63 *Social Science & Med.* 1531–45 (Sept. 2006), available at <https://www.sciencedirect.com/science/article/pii/S027795360600205X>

<sup>172</sup>Atkins DN and Wilkins VM, “Going Beyond Reading, Writing, and Arithmetic: The Effects of Teacher Representation on Teen Pregnancy Rates,” 23 *J. Pub. Admin. Research & Theory* 771–90 (Oct. 1, 2013), available at <https://academic.oup.com/jpart/article-abstract/23/4/771/963674>.

<sup>173</sup>E. Collins & B. Herchbein, “The Impact of Subsidized Birth Control for College Women: Evidence from the Deficit Reduction Act,” *U. Mich. Pop. Studies Ctr. Report* 11-737 (May 2011), available at <https://www.psc.isr.umich.edu/pubs/pdf/rr11-737.pdf> (“[I]ncrease in the price of the Pill on college campuses . . . did not increase the rates of unintended pregnancy or sexually transmitted infections for most women”).

<sup>174</sup>See D. Paton & L. Wright, “The effect of spending cuts on teen pregnancy,” 54 *J. Health Econ.* 135, 135-46 (2017), available at <https://www.sciencedirect.com/science/article/abs/pii/S0167629617304551> (“Contrary to predictions made at the time of the cuts, panel data estimates provide no evidence that areas which reduced expenditure the most have experienced relative increases in teenage pregnancy rates. Rather, expenditure cuts are associated with small reductions in teen pregnancy rates”).

<sup>175</sup>Commenters cited, for example, Guttmacher Institute, “Fact Sheet: Induced Abortion in the United States” (Jan. 2018) (“Fifty-one percent of abortion patients in 2014 were using a contraceptive method in the month they became pregnant”), available at [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf).

<sup>176</sup>M.L. Kavanaugh et al., “Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014,” 97 *Contraception* 14, 14–21 (2018), available at [http://www.contraceptionjournal.org/article/S0010-7824\(17\)30478-X/pdf](http://www.contraceptionjournal.org/article/S0010-7824(17)30478-X/pdf).

<sup>177</sup>Id.

noted that in the 29 states where contraceptive coverage mandates have been imposed statewide,<sup>178</sup> those mandates have not necessarily lowered rates of unintended pregnancy (or abortion) overall.<sup>179</sup>

Other commenters, however, disputed the significance of these state statistics, noting that, of the 29 states with contraceptive coverage mandates, only four states have laws that match the federal requirements in scope. Some also observed that, even in states with state contraceptive coverage mandates, self-insured group health plans might escape those requirements, and some states do not mandate the contraceptives to be covered at no out-of-pocket cost to the beneficiary.

The Departments have considered these experiences as relevant to the effect the exemption in these rules might have on the Mandate more broadly. The state mandates of contraceptive coverage still apply to a very large number of plans and plan participants notwithstanding ERISA preemption, and public commenters did not point to studies showing those state mandates reduced unintended pregnancies. The federal contraceptive Mandate, likewise, applies to a broad, but not entirely comprehensive, number of employers. For example, to the extent that houses of worship and integrated auxiliaries may have self-insured to avoid state health insurance contraceptive coverage mandates or for other reasons, those groups were already exempt from the federal Mandate prior to the 2017 Religious and Moral IFCs. The exemptions as set forth in the Moral IFC and in these final rules leave the contraceptive Mandate in place for nearly all entities and plans to which the Mandate has applied. The Departments are not aware of data showing that these expanded exemptions would negate any reduction in unintended pregnancies that might result from the contraceptive Mandate here.

Some commenters took a view that appears to disagree with the assertion in the

2017 Guttmacher study, that “[t]he role that the contraceptive coverage guarantee played in impacting use of contraception at the national level remains unclear, as there was no significant increase in the use of methods that would have been covered under the ACA.” These commenters instead observed that, under the Mandate, more women have coverage of contraceptives and contraception counseling and that more contraceptives are provided without co-pays than before. Still others argued that the Mandate, or other expansions of contraceptive coverage, have led women to increase their use of contraception in general, or to change from less effective, less expensive contraceptive methods to more effective, more expensive contraceptive methods. Some commenters pointed to studies cited in the 2011 IOM Report recommending contraception be included in the Guidelines and argued that certain women will go without certain health care, or contraception specifically, because of cost. They contended that a smaller percentage of women delay or forego health care overall under the ACA<sup>180</sup> and that, according to studies, coverage of contraceptives without cost-sharing has increased use of contraceptives in certain circumstances. Some commenters also stated that studies show that decreases in unintended pregnancies are due to broader access to contraceptives. Finally, some commenters also stated that birth control access generally has led to social and economic equality for women.

The Departments have reviewed the comments, including studies submitted by commenters either supporting or opposing these expanded exemptions. Based on that review, it is not clear that merely offering the exemption in these rules will have a significant effect on contraceptive use and health, or workplace equality, for the vast majority of women benefitting from the Mandate. There is conflicting evidence regarding whether the Mandate alone, as distinct from contraceptive access more generally, has caused increased contracep-

tive use, reduced unintended pregnancies, or eliminated workplace disparities, where all other women’s preventive services were covered without cost sharing. Without taking a definitive position on those evidentiary issues, however, the Departments conclude that the Moral IFC and these final rules—which merely withdraw the Mandate’s requirement from what appears to be a small number of newly exempt entities and plans—are not likely to have negative effects on the health or equality of women nationwide. The Departments also conclude that the expanded exemptions are an appropriate policy choice left to the agencies under the relevant statutes, and, thus, an appropriate exercise of the Departments’ discretion.

Moreover, the Departments conclude that the best way to balance the various policy interests at stake in the Moral IFC and these final rules is to provide the exemptions set forth herein, even if certain effects may occur among the populations actually affected by the employment of these exemptions. These rules provide tangible conscience protections for moral convictions, and impose fewer governmental burdens on various entities and individuals, some of whom have contended for several years that denying them an exemption from the contraceptive Mandate imposes a burden on their moral convictions. The Departments view the provision of those protections to preserve conscience in this health care context as an appropriate policy option, notwithstanding the widely divergent effects that public commenters have predicted based on different studies they cited. Providing the protections for moral convictions set forth in the Moral IFC and these final rules is not inconsistent with the ACA, and brings this Mandate into better alignment with various other federal conscience protections in health care, some of which have been in place for decades.

<sup>178</sup>See Guttmacher Institute, “Insurance Coverage of Contraceptives” (June 11, 2018); “State Requirements for Insurance Coverage of Contraceptives,” Henry J Kaiser Family Foundation (Jan. 1, 2018), <https://www.kff.org/other/state-indicator/state-requirements-for-insurance-coverage-of-contraceptives/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

<sup>179</sup>See Michael J. New, “Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes,” 13 *Ave Maria L. Rev.* 345 (2015), available at <http://avemarialaw-law-review.avemarialaw.edu/Content/articles/vXIII.i2.new.final.0809.pdf>.

<sup>180</sup>Citing, for example, Adelle Simmons et al., “The Affordable Care Act: Promoting Better Health for Women,” Table 1, ASPE (June 14, 2016), <https://aspe.hhs.gov/system/files/pdf/205066/ACAWomenHealthIssueBrief.pdf>.



## 9. Other General Comments

Some commenters expressed the view that the exemptions afforded in the Moral IFC and herein violate the RFRA rights of women who might not receive contraceptive coverage as the result of these final rules, by allowing their employers to impose their moral convictions on them by removing contraceptive coverage through use of the exemption. Still other commenters stated that employer payment of insurance premiums is part of any employee's compensation package, the benefits of which employers should not be able to limit. In the Departments' view, the expanded exemptions in these final rules do not prohibit employers from providing contraceptive coverage. Instead, they lift a government burden that was imposed on some employers to provide contraceptive coverage to their employees in violation of those employers' moral convictions. The Departments do not believe RFRA requires, or has ever required, the federal government to force employers to provide contraceptive coverage. The federal government's decision to exempt some entities from a requirement to provide no-cost-sharing services to private citizens does not constitute a federal government-imposed burden on the latter under RFRA.

Some commenters asked the Departments to discuss the interaction between these rules and state laws that either require contraceptive coverage or provide exemptions from those and other requirements. Some commenters argue that providing the exemptions in these rules would negate state contraceptive requirements or narrower state exemptions. Some commenters asked that the Departments specify that these exemptions do not apply to plans governed by state laws that require contraceptive coverage.

The Departments agree that these rules only concern the applicability of the federal contraceptive Mandate imposed pursuant to section 2713(a)(4). They do not regulate state contraceptive mandates or state exemptions. If a plan is exempt under the Moral IFC and these final rules,

that exemption does not necessarily exempt the plan or other insurance issuer from state laws that may apply to it. The previous regulations, which offered exemptions for houses of worship and integrated auxiliaries, did not include regulatory language negating the exemptions in states that require contraceptive coverage, although the Departments discussed the issue to some degree in various preambles of those previous regulations. The Departments do not consider it appropriate or necessary in the regulatory text of the moral exemption rules to declare whether the federal contraceptive Mandate would still apply in states that have a state contraceptive mandate, since these rules do not purport to regulate the applicability of state contraceptive mandates.<sup>181</sup>

Some commenters observed that, through ERISA, some entities may avoid state laws that require contraceptive coverage by self-insuring. This is a result of the application of the preemption and savings clauses contained in ERISA to state insurance regulation. *See* 29 U.S.C. 1144(a) & (b)(1).

These final rules cannot change statutory ERISA provisions, and do not change the standards applicable to ERISA preemption. To the extent Congress has decided that ERISA preemption includes preemption of state laws requiring contraceptive coverage, that decision occurred before the ACA and was not negated by the ACA. Congress did not mandate in the ACA that any Guidelines issued under section 2713(a)(4) must include contraceptives, nor that the Guidelines must force entities with moral objections to cover contraceptives.

Finally, some commenters expressed concern that providing moral exemptions to the mandate that private parties provide contraception may lead to exemptions regarding other medications or services, like vaccines. The exemptions provided in these rules, however, do not apply beyond the contraceptive coverage requirement implemented through section 2713(a)(4). Specifically, section 2713(a)(2) of the PHS Act requires coverage of "immunizations," and these exemptions do not en-

compass that requirement. The fact that the Departments have exempted houses of worship and integrated auxiliaries from the contraceptive Mandate since 2011 did not lead to those entities receiving exemptions under section 2713(a)(2) concerning vaccines. In addition, hundreds of entities have sued the Departments over the implementation of section 2713(a)(4), leading to two decisions of the U.S. Supreme Court, but no similar wave of lawsuits has challenged section 2713(a)(2). The expanded exemptions in these final rules are consistent with a long history of statutes protecting moral convictions from certain health care mandates concerning issues such as sterilization, abortion and birth control.

### B. Text of the Final Rules

In this section, the Departments describe the regulations from the Moral IFC, public comments in response to the specific regulatory text set forth in the IFC, the Departments' response to those comments, and, in consideration of those comments, the regulatory text as finalized in this final rule. We also note the regulatory text as it existed prior to the Religious and Moral IFCs, as appropriate. The Departments consider the exemptions finalized here to be an appropriate and permissible policy choice in light of various interests at stake and the lack of a statutory requirement for the Departments to impose the Mandate on entities and plans that qualify for these exemptions.

As noted above, various members of the public provided comments that were supportive, or critical, of the regulations overall, or of significant policies pertaining to the regulations. To the extent those comments apply to the following regulatory text, the Departments have responded to them above. This section of the preamble responds to comments that pertain more specifically to particular regulatory text.

<sup>181</sup>Some commenters also asked that these final rules specify that exempt entities must comply with other applicable laws concerning such things as notice to plan participants or collective bargaining agreements. These final rules relieve the application of the federal contraceptive Mandate under section 2713(a)(4) to qualified exempt entities; they do not affect the applicability of other laws. In the preamble to the companion final rules concerning religious exemptions published elsewhere in today's **Federal Register**, the Departments provide guidance applicable to notices of revocation and changes that an entity may seek to make during its plan year.

1. Restatement of Statutory Requirements of Section 2713(a) and (a)(4) of the PHS Act (26 CFR 54.9815–2713(a)(1) and (a)(1)(iv), 29 CFR 2590.715–2713(a)(1) and (a)(1)(iv), and 45 CFR 147.130(a)(1) and (a)(1)(iv)).

The previous regulations restated the statutory requirements of section 2713(a) and (a)(4) of the PHS Act, at 26 CFR 54.9815–2713(a)(1) and (a)(1)(iv), 29 CFR 2590.715–2713(a)(1) and (a)(1)(iv), and 45 CFR 147.130(a)(1) and (a)(1)(iv). The Religious IFC modified those restatements to more closely align them with the text of section 2713(a) and (a)(4) of the PHS Act. Those sections cross-reference the other sections of the Departments’ rules that provide exemptions to the contraceptive Mandate. After the Religious IFC changed those sections, the Moral IFC inserted, within those cross-references, references to the new § 147.133, which contains the text of the moral exemptions. The insertions correspond to the cross-references to the religious exemptions added by the Religious IFC. The Departments finalize these parts of the Moral IFC without change.

## 2. Exemption for Objecting Entities Based on Moral Convictions (45 CFR 147.133(a))

The previous regulations contained no exemption concerning moral convictions, as distinct from religious beliefs. Instead, at 45 CFR 147.131(a), they offered an exemption for houses of worship and integrated auxiliaries. In the remaining part of § 147.131, the previous regulations described the accommodation process for organizations with religious objections. The Religious IFC moved the religious exemption to a new section 45 CFR 147.132, and expanded its scope. The Moral IFC created a new section 45 CFR 147.133, providing exemptions for moral convictions similar to, but not exactly the same as, the exemptions for religious beliefs set forth in § 147.132.

The prefatory language of § 147.133(a) not only specifies that certain entities are “exempt,” but also explains that the Guidelines shall not support or provide for an imposition of the contraceptive coverage requirement to such exempt entities. This is an acknowledgement that section

2713(a)(4) requires women’s preventive services coverage only “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration.” To the extent the HRSA Guidelines do not provide for, or support, the application of such coverage to certain entities or plans, the Affordable Care Act does not require the coverage. Those entities or plans are “exempt” by not being subject to the requirements in the first instance. Therefore, in describing the entities or plans as “exempt,” and in referring to the “exemption” encompassing those entities or plans, the Departments also affirm the non-applicability of the Guidelines to them.

The Departments wish to make clear that the expanded exemption set forth in § 147.133(a) applies to several distinct entities involved in the provision of coverage to an objecting employer’s employees. This explanation is consistent with how prior regulations have worked by means of similar language. When § 147.133(a)(1) and (a)(1)(i) specify that “[a] group health plan,” “health insurance coverage provided in connection with a group health plan,” and “health insurance coverage offered or arranged by an objecting organization” are exempt “to the extent” of the objections “as specified in paragraph (a)(2),” that language exempts the group health plans of the sponsors that object, and their health insurance issuers in providing the coverage in those plans (whether or not the issuers have their own objections). Consequently, with respect to Guidelines issued under § 147.130(a)(1)(iv) (and as referenced by the parallel provisions in 26 CFR 54.9815 through 2713(a)(1)(iv) and 29 CFR 2590.715 through 2713(a)(1)(v)), the plan sponsor, issuer, and plan covered in the exemption of that paragraph would face no penalty as a result of omitting contraceptive coverage from the benefits of the plan participants and beneficiaries. However, while a plan sponsor’s or arranger’s objection removes penalties from that group health plan’s issuer, it only does so with respect to that group health plan—it does not affect the issuer’s coverage for other group health plans where the plan sponsor has no qualifying objection. More information on the effects of the objection of a health insurance issuer in § 147.133(a)(1)(iii) is included below.

The exemptions in § 147.133(a)(1) apply “to the extent” of the objecting entities’ sincerely held moral convictions. Thus, entities that hold a requisite objection to covering some, but not all, contraceptive items would be exempt with respect to the items to which they object, but not with respect to the items to which they do not object. Some commenters stated it was unclear whether the plans of entities or individuals that morally object to some but not all contraceptives would be exempt from being required to cover just the contraceptive methods as to which there is an objection, or whether the objection to some contraceptives leads to an exemption from that plan being required to cover all contraceptives. The Departments intend that a requisite moral objection to some, but not all, contraceptives would lead to an exemption only to the extent of that objection: that is, the exemption would encompass only the items to which the relevant entity or individual objects and would not encompass contraceptive methods to which the objection does not apply. To make this clearer, in these final rules the Departments finalize the prefatory language of § 147.133(a) so that the first sentence of that paragraph states that an exemption shall be included, and the Guidelines must not provide for contraceptive coverage, “to the extent of the objections specified below.” The Departments have made corresponding changes to language throughout the regulatory text, to describe the exemptions as applying “to the extent” of the objection(s).

The exemptions contained in previous regulations, at § 147.131(a), did not require an exempt entity to submit any particular self-certification or notice, either to the government or to the entity’s issuer or third party administrator, in order to obtain or qualify for their exemption. Similarly, under the expanded exemptions in § 147.133, the Moral IFC did not require exempt entities to comply with a self-certification process. We finalize that approach without change. Although exempt entities do not need to file notices or certifications of their exemption, and these final rules do not impose any new notice requirements on them, existing ERISA rules governing group health plans require that, with respect to plans subject to ERISA, a plan document must include a

comprehensive summary of the benefits covered by the plan and a statement of the conditions for eligibility to receive benefits. Under ERISA, the plan document identifies what benefits are provided to participants and beneficiaries under the plan; if an objecting employer would like to exclude all or a subset of contraceptive services, it must ensure that the exclusion is clear in the plan document. Moreover, if there is a reduction in a covered service or benefit, the plan has to disclose that change to plan participants.<sup>182</sup> Thus, where an exemption applies and all (or a subset of) contraceptive services are omitted from a plan's coverage, otherwise applicable ERISA disclosures must reflect the omission of coverage in ERISA plans. These existing disclosure requirements serve to help provide notice to participants and beneficiaries of what ERISA plans do and do not cover.

Some commenters supported this approach, while others did not. Those in favor suggested that self-certification forms for an exemption are not necessary, could add burdens to exempt entities beyond those imposed by the previous exemption, and could give rise to objections to the self-certification process itself. Commenters also stated that requiring an exemption form for exempt entities could cause additional operational burdens for plans that have existing processes in place to handle exemptions. Other commenters favored including a self-certification process for exempt entities. They suggested that entities might abuse the availability of an exemption or use their exempt status insincerely if no self-certification process exists, and that the Mandate might be difficult to enforce without a self-certification process.

After considering the comments, the Departments continue to believe it is appropriate to not require exempt entities to submit a self-certification or notice. The previous exemption did not require a self-certification or notice, and the Departments did not collect a list of all entities that used the exemption, although there may have been thousands of houses of worship and integrated auxiliaries covered by the previous exemption and the De-

partments think it likely that only a small number of entities will use the moral exemption. Adding a self-certification or notice to the exemption would impose an additional paperwork burden on exempt entities that the previous regulations did not impose, and would also involve additional public costs if those certifications or notices are to be reviewed or kept on file by the government.

The Departments are not aware of instances where the lack of a self-certification under the previous exemption led to abuses or to an inability to engage in enforcement. The Mandate is enforceable through various mechanisms in the PHS Act, the Code, and ERISA. Entities that insincerely or otherwise improperly operate as if they are exempt would do so at the risk of enforcement and accountability under such mechanisms. The Departments are not aware of sufficient reasons to believe those measures and mechanisms would fail to deter entities from improperly operating as if they are exempt. Moreover, as noted above, ERISA and other plan disclosure requirements governing group health plans require provision of a comprehensive summary of the benefits covered by the plan and disclosure of any reductions in covered services or benefits, so beneficiaries will know whether their health plan claims a contraceptive Mandate exemption and will be able to raise appropriate challenges to such claims. As a consequence, the Departments believe it is an appropriate balance of various concerns expressed by commenters for these final rules to continue to not require notices or self-certifications for using the exemption.

Some commenters asked the Departments to add language indicating that an exemption cannot be invoked in the middle of a plan year, nor should it be used to the extent inconsistent with laws that apply to, or state approval of, fully insured plans. None of the previous iterations of the exemption regulations included such provisions, and the Departments do not consider them necessary in these final rules. The exemptions in these final rules only purport to exempt plans and entities from the application of the federal contraceptive coverage requirement of the Guidelines issued under section 2713(a)(4). They do not

purport to exempt entities or plans from state laws concerning contraceptive coverage, or laws governing whether an entity can make a change (of whatever kind) during a plan year. Final rules governing the accommodation likewise do not purport to obviate the need to follow otherwise applicable rules about making changes during a plan year. (In the companion rules concerning religious beliefs published elsewhere in today's **Federal Register**, the Departments discuss in more detail the accommodation and when an entity seeking to revoke it would be able to do so or to notify plan participants of the revocation.)

Commenters also asked that clauses be added to the regulatory text holding issuers harmless where exemptions are invoked by plan sponsors. As discussed above, the exemption rules already specify that where an exemption applies to a group health plan, it encompasses both the group health plan and health insurance coverage provided in connection with the group health plan, and therefore encompasses any impact on the issuer of the contraceptive coverage requirement with respect to that plan. In addition, as discussed in the companion religious final rule published elsewhere in today's **Federal Register**, the Departments have added language from the previous regulations, in § 147.131(f), to protect issuers that act in reliance on certain representations made in the accommodation process. To the extent that commenters seek language offering additional protections for other incidents that might occur in connection with the invocation of an exemption, the previous exemption regulations did not include such provisions, and the Departments do not consider them necessary in these final rules. As noted above, the expanded exemptions in these final rules simply remove or narrow the contraceptive Mandate contained in, and derived from, the Guidelines for certain plans. The previous regulations included a reliance clause in the accommodation provisions, but did not specify further details regarding the relationship between exempt entities and their issuers or third party administrators. The Departments do not believe it necessary to do so in these final rules.

<sup>182</sup>See, for example, 29 U.S.C. 1022, 1024(b), 29 CFR 2520.102-2, 2520.102-3, & 2520.104b-3(d), and 29 CFR 2590.715-2715. See also 45 CFR 147.200 (requiring disclosure of the "exceptions, reductions, and limitations of the coverage," including group health plans and group & individual issuers).



Commenters disagreed about the likely effects of the moral exemptions on the health coverage market. Some commenters stated that expanding the exemptions to encompass moral convictions would not cause complications in the market, while others said that it could, due to such causes as a lack of uniformity among plans, or permitting multiple risk pools. The Departments note that the extent to which plans cover contraception under the prior regulations is already far from uniform. Congress did not require all entities to comply with section 2713 of the PHS Act (under which the Mandate was promulgated)—most notably by exempting grandfathered plans. Moreover, under the previous regulations, issuers were already able to offer plans that omit contraceptives—or only some contraceptives—to houses of worship and integrated auxiliaries, and some commenters and litigants said that issuers were doing so. These cases where plans did not need to comply with the Mandate, and the Departments’ previous accommodation process which had the effect of allowing coverage not to be provided in certain self-insured church plans, together show that the importance of a uniform health coverage system is not significantly harmed by allowing plans to omit contraception in some contexts.<sup>183</sup>

Concerning the prospect raised by some commenters of different risk pools between men and women, section 2713(a) of the PHS Act itself provides for some preventive services coverage that applies to both men and women, and some that would apply only to women. With respect to the latter, it does not specify what, if anything, HRSA’s Guidelines for women’s preventives services would cover, or if contraceptive coverage will be required. The Moral IFC and these final rules do not require issuers to offer health insurance products that satisfy morally objecting entities, they simply make it legal to do so. The Mandate has been imposed only relatively recently, and the contours of its application to objecting entities has been in continual flux, due to various rulemakings and court orders. Overall, concerns

raised by some public commenters have not led the Departments to consider it likely that offering these expanded exemptions will cause any injury to the uniformity or operability of the health coverage market.

### 3. Exemption for Certain Plan Sponsors (45 CFR 147.133(a)(1)(i))

The exemption in § 147.133(a)(1)(i) of the Moral IFC covers a group health plan and health insurance coverage for non-governmental plan sponsors that object as specified in paragraph (a)(2), and that are either nonprofit organizations, or are for-profit entities that have no publicly traded ownership interests (defined as any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934). The Departments finalize this paragraph without change, and discuss each part of the paragraph in turn.

#### a. Plan sponsors in general (45 CFR 147.133(a)(1)(i) prefatory text)

Under the plan sponsor exemption in § 147.132(a)(1)(i), the prefatory text in that paragraph specifies that it encompasses group health plans, and health insurance coverage provided in connection with such group health plans, that are sponsored by certain kinds of entities, namely, nonprofit organizations or for-profit entities that have no publicly traded ownership interests.

Such plan sponsors, if they are otherwise nonprofit organizations or for-profit entities that have no publicly traded ownership interests, can include entities that are not employers (for example, a union, or a sponsor of a multiemployer plan), where the plan sponsor objects based on sincerely held moral convictions to coverage of contraceptives or sterilization. Plan sponsors encompassed by the exemption can also include employers, and consistent with the definition of “employer” in 29 CFR 2510.3-5, can include association health plans, where the plan sponsor is a nonprofit organization or a for-profit en-

tity that has no publicly traded ownership interests.

Some commenters objected to extending the exemption to plan sponsors that are not single employers, arguing that they could not have the same kind of moral objection that a single employer might have. Other commenters supported the protection of any plan sponsor with the requisite moral objection. The Departments conclude that it is appropriate, where a plan sponsor of a multiemployer plan or multiple employer plan adopts a moral objection using the same procedures that such a plan sponsor might use to make other decisions, to respect that decision by providing an exemption from the Mandate.

The plans of governmental employers are not covered by the plan sponsor exemption in § 147.133(a)(1)(i), which instead limits the moral exemptions to “non-governmental plan sponsors.” As noted above, the Departments sought public comment on whether to extend the exemptions to non-federal governmental plan sponsors. Some commenters suggested that the moral exemptions should include government entities because other conscience laws can include government entities, such as when they oppose offering abortions. Others disagreed, contending that governmental entities should not or cannot object based on moral convictions, or that it would be unlawful for them to do so.

The Departments are sympathetic to the arguments of commenters that favor including government entities in the exemption for moral convictions. The protections outlined in the first paragraph of the Church Amendments for entities that object based on moral convictions to making their facilities or personnel available to assist in the performance of abortions or sterilizations do not turn on the nature of the entity, whether public, private, nonprofit, for-profit, or governmental. (42 U.S.C. 300a-7(b)). Both the Weldon and Coats-Snowe Amendments also protect state and local government entities from providing, promoting, or paying for abor-

<sup>183</sup>See also *Real Alternatives*, 867 F.3d 338, 389 (3d Cir. 2017) (Jordan, J., concurring in part and dissenting in part) (“Because insurance companies would offer such plans as a result of market forces, doing so would not undermine the government’s interest in a sustainable and functioning market. . . . Because the government has failed to demonstrate why allowing such a system (not unlike the one that allowed wider choice before the ACA) would be unworkable, it has not satisfied strict scrutiny.” (citation and internal quotation marks omitted)).

tions in particular ways.<sup>184</sup> Congress has generally not limited protections for conscience based on the nature of an entity—even in the case of governmental entities.

At the same time, the Departments do not at this time have information suggesting that an exemption for governmental entities is needed or desired. The Departments have not been sued by any governmental entities raising objections to the Mandate based on non-religious moral convictions. Although the Departments sought public comment on the issue, the Departments received no public comments identifying governmental entities that need or desire such an exemption. Rather, the Departments are aware of governmental entities that, despite not possessing their own objections to contraceptive coverage, have acted to protect their employees who have conscientious objections to receiving contraceptive coverage in their employer-provided health insurance plans. See *Wieland v. U.S. Dep't of Health & Human Servs.*, 196 F. Supp. 1010, 1015–16 (E.D. Mo. 2016) (quoting Mo. Rev. Stat. 191.724). The individual exemption adopted in these rules will ensure the Mandate is not an obstacle to those efforts.

Thus, in light of the balance of public comments, the Departments decline to extend the moral convictions exemption to governmental entities. As is the case with the Departments' decision not to extend the moral exemption to publicly traded for-profit entities, this decision does not reflect a disagreement with the various conscience statutes that provide exemptions for moral convictions without categorically excluding governmental entities. The Departments remain open to the possibility of future rulemaking on this issue if the Departments become aware of a governmental entity seeking to be exempt from the contraceptive Mandate.

#### b. Nonprofit organizations (45 CFR 147.133(a)(1)(i)(A))

As discussed above, some commenters opposed offering exemptions based on

moral convictions to any plan sponsors, and/or objected to doing so for nonprofit organizations, on various grounds, including but not limited to arguments that the benefits of contraception access should override moral objections, entities cannot assert moral objections, and moral objections burden third parties. Other commenters supported the exemptions, generally defending the interest of nonprofit organizations not to be forced to violate their moral convictions, supporting the history of government protection of moral convictions in similar contexts, and disputing the claims of opponents of the exemptions.

The Departments are aware, through litigation, of only two non-religious nonprofit organizations with moral objections to the contraceptive Mandate. Many more nonprofit religious organizations have sued suggesting—as discussed below—that the effect of this exemption for non-religious nonprofit objections to the Mandate will be far less significant than commenters who oppose the exemption believe it will. The two non-religious nonprofit organizations that challenged the Mandate in court provide a good illustration of the reasons why the Department has decided to provide this exemption to nonprofit organizations. Both organizations have said in court they oppose certain contraceptives on non-religious moral grounds as being abortifacient and state that they only hire employees who share that view. Public comments and litigation reflect that many nonprofit organizations publicly describe their beliefs and convictions. Government records and many of those groups' websites also often reflect those groups' religious or moral character, as the case may be. If a person who desires contraceptive coverage works at a nonprofit organization, the Departments view it as sufficiently likely that the person would know, or would know to ask, whether the organization offers such coverage. The Departments are not aware of federal laws that would require a nonprofit organization that opposes contraceptive coverage to hire a person who disagrees

with the organization's view on contraceptive coverage. Instead, nonprofit organizations generally have access to a First Amendment right of expressive association to choose to hire persons (or, in the case of students, to admit them) based on whether they share, or at least will be respectful of, their beliefs.<sup>185</sup>

The Departments agree with commenters who support offering the exemption to nonprofit organizations and believe that doing so is an appropriate protection and is not likely to have a significant impact on women who want contraceptive coverage.

#### c. For-Profit Entities (45 CFR 147.133(a)(1)(i)(B))

With respect to for-profit organizations addressed in § 147.133(a)(1)(i)(B), in the Moral IFC, the Departments did not limit the exemption to nonprofit organizations, but also included some for-profit entities. Some commenters supported including for-profit entities in the exemption, saying owners of such entities exercise their moral convictions through their businesses, and that such owners should not be burdened by a federal governmental contraceptive Mandate. Other commenters opposed extending the exemption to closely held for-profit entities, saying the entities cannot exercise moral convictions or should not have their moral opposition to contraceptive coverage protected by the exemption. Some commenters stated that the entities should not be able to impose their beliefs about contraceptive coverage on their employees and that doing so constitutes discrimination.

The Departments agree with commenters who support including some for-profit entities in the exemption. Many of the federal health care conscience statutes cited above offer protections for the moral convictions of entities, without regard to whether they operate as nonprofit organizations or for-profit entities. In addition, nearly half of the states either impose no contraceptive coverage requirement or offer “an almost unlimited” exemption en-

<sup>184</sup>Consolidated Appropriations Act, 2018, Div. H, Sec. 507(d), 132 Stat. at 764 (protecting any “hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan” in objecting to abortion); 42 U.S.C. 238n (protecting entities that object to abortion, including, but not limited to, any “postgraduate physician training program”).

<sup>185</sup>Notably, “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’” *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

compassing both “religious and secular organizations.”<sup>186</sup> States also generally protect moral convictions in other health care conscience laws whether or not an entity operates as a nonprofit.<sup>187</sup>

Extending the exemption to certain for-profit entities is also consistent with the Supreme Court’s ruling in *Hobby Lobby*, which declared that a corporate entity is capable of possessing and pursuing non-pecuniary goals (in *Hobby Lobby*, the pursuit of religious beliefs), regardless of whether the entity operates as a nonprofit organization and rejected the Departments’ argument to the contrary. 134 S. Ct. at 2768–75. The mechanisms by which a for-profit company makes decisions of conscience, or resolves disputes on those issues among their owners, are problems that “state corporate law provides a ready means” of solving. *Id.* at 2774–75. Some reports and industry experts have indicated that few for-profit entities beyond those that had originally challenged the Mandate have sought relief from it after *Hobby Lobby*.<sup>188</sup> Because all of those appear to be informed by religious beliefs, extending the exemption to entities with non-religious moral convictions would seem to have an even smaller impact on access to contraceptive coverage.

The Moral IFC only extended the exemption covering for-profit entities to those that are closely held, not to for-profit entities that are publicly traded, but asked for comment on whether publicly traded entities should be included in the moral exemption. In this way the Moral IFC differed from the exemption provided to plan sponsors with objections based on sincerely held religious beliefs set forth in the Religious IFC, at § 147.132(a)(1), finalized in companion rules published elsewhere in today’s **Federal Register**.

Some commenters supported including publicly traded entities in the moral exemption, contending that publicly traded entities have historically taken various positions on important public concerns beyond merely seeking the company’s own

profits, and that nothing in principle would preclude them from using the same mechanisms of corporate decision-making to establish and exercise moral convictions against contraceptive coverage. They observed that large publicly traded entities are exempt from the contraceptive Mandate by means of the grandfathering provision of the ACA, so that it is inappropriate to refuse to exempt publicly traded entities that actually have sincerely held moral convictions against compliance with the Mandate. They further argued that in some instances there are closely held companies that are as large as publicly traded companies of significant size. They also stated that other protections for moral convictions in certain federal health care conscience statutes do not preclude the application of such protections to certain entities on the basis that they are not closely held, and federal law defines “persons” to include all forms of corporations, not just closely held corporations, at 1 U.S.C. 1. Additionally, some commenters were concerned that not providing a moral exemption for publicly traded for-profit entities but allowing a religious exemption for publicly traded for-profit entities (as was allowed in the Religious IFC, and as is allowed in the companion religious final rules published elsewhere in today’s **Federal Register**), may raise Establishment Clause questions, may cause confusion to the public, and may make the exemptions more difficult for the Departments and enforcing agencies to administer. They stated that it is incongruous to include publicly traded entities in the exemption for religious beliefs, but exclude them from the exemption for moral convictions.

Other commenters opposed including publicly traded companies in these moral exemptions. Some stated that such companies could not exercise moral convictions and opposed the effects on women if they would. They also objected that including such companies, along with closely held businesses, would extend the exemptions to all or virtually all compa-

nies. Some commenters stated that many publicly traded companies would use a moral exemption if available to them, because many closely held for-profit businesses expressed religious objections to the Mandate, or availed themselves of the religious accommodation.

As is the case for non-federal governmental employers, the Departments are sympathetic to the arguments of commenters that favor including publicly traded entities in the exemption for moral convictions. In the case of particularly sensitive health care matters, several significant federal health care conscience statutes protect entities’ moral objections without regard to their ownership status. For example, the first paragraph of the Church Amendments provides certain protections for entities that object based on moral convictions to making their facilities or personnel available to assist in the performance of abortions or sterilizations; the protections of the Church Amendments do not turn on the nature of the entity, whether public, private, non-profit, for-profit, or governmental. (42 U.S.C. 300a–7(b)). Thus, under section 300a–7(b), a hospital in a publicly traded health system, or a local governmental hospital, could adopt sincerely held moral convictions by which it objects to providing facilities or personnel for abortions or sterilizations, and if the entity receives relevant funds from HHS specified by section 300a–7(b), the protections of that section would apply. Other federal conscience protections in the health sector apply in the same manner:

- The Coats-Snowe Amendment (42 U.S.C. 238n) provides certain protections for health care entities and post-graduate physician training programs that, among other things, choose not to perform, refer for, or provide training for, abortions.
- The Weldon Amendment<sup>189</sup> provides certain protections for health care entities, hospitals, provider-sponsored organizations, health maintenance or-

<sup>186</sup>“Insurance Coverage of Contraceptives,” The Guttmacher Institute (June 11, 2018), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

<sup>187</sup>See, e.g., “Refusing to Provide Health Services,” The Guttmacher Institute (June 1, 2018), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services>.

<sup>188</sup>See Jennifer Haberkorn, “Two years later, few Hobby Lobby copycats emerge,” *Politico* (Oct. 11, 2016), <http://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627>.

<sup>189</sup>See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, Sec. 507(d) (Mar. 2018).



ganizations, and health insurance plans that do not provide, pay for, provide coverage of, or refer for abortions.

- The ACA provides certain protections for any institutional health care entity, hospital, provider-sponsored organization, health maintenance organization, health insurance plan, or any other kind of health care facility, that does not provide any health care item or service furnished for the purpose of causing or assisting in causing assisted suicide, euthanasia, or mercy killing. (42 U.S.C. 18113).<sup>190</sup>
- Social Security Act sections 1852(j)(3)(B) (Medicare) and 1932(b)(3)(B) (Medicaid), 42 U.S.C. 1395w-22(j)(3)(B) and 1396u-2(b)(3)(B), provide protections so that the statutes cannot be construed to require organizations that offer Medicare Advantage and Medicaid managed care plans in certain contexts to provide, reimburse for, or provide coverage of a counseling or referral service if they object to doing so on moral grounds.
- Congress’s most recent statement on contraceptive coverage specified that, if the District of Columbia requires “the provision of contraceptive coverage by health insurance plans,” “it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious beliefs and moral convictions.” Consolidated Appropriations Act, 2018, Pub. L. 115–141, Div. E, Sec. 808.

In all of these instances, Congress did not limit the protection for conscience based on the nature of the entity—and did not exclude publicly traded entities from protection.

At the same time, as stated in the Moral IFC, the Departments continue to lack significant information about whether there is a need to extend the expanded exemption to publicly traded entities. The Departments have been sued by nonprofit entities expressing objections to the Mandate based on non-religious moral convictions, as well as by closely held for-profit entities expressing religious objections, but not by any publicly traded entities. In

addition, the Departments sought public comments on whether publicly traded entities might benefit from extending the moral exemption to them. No such entities were brought to the attention of the Department through the comment process. The Supreme Court concluded it is improbable that publicly traded companies with numerous “unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs.” *Hobby Lobby*, 134 S. Ct. at 2774. It would appear to be even less probable that publicly traded entities would adopt that view based on non-religious moral convictions.

In light of the balance of public comments, the Departments decline to extend the moral convictions exemption to publicly traded entities. Because the Departments are aware of so many closely-held for-profit entities with religious objections to contraceptive coverage, and of some nonprofit entities with non-religious moral objections to contraceptive coverage, the Departments believe it is reasonably possible that closely held for-profit entities with non-religious moral objections to contraceptive coverage might exist or come into being. The Departments have also concluded that it is reasonably possible, even if improbable, that publicly traded entities with religious objections to contraceptive coverage might exist or come into being. But the Departments conclude there is not a similar probability that publicly traded for-profit entities with non-religious moral objections to contraceptive coverage may exist and need to be included in these expanded exemptions. The decision to not extend the moral exemption to publicly traded for-profit entities in these rules does not reflect a disagreement with the various conscience statutes that provide exemptions for moral convictions without categorically excluding publicly traded entities. The Departments remain open to the possibility of future rulemaking on this issue, if we become aware of the need to expand the exemptions to publicly traded corporations with non-religious moral objections to all (or a subset of) contraceptives.

In contrast, the Departments finalize, without change, the Moral IFC’s extension of the exemptions in these rules to closely held for-profit entities with moral convictions opposed to offering coverage of some or all contraceptives. The Departments conclude that it is sufficiently likely that closely held for-profit entities exist or may come into being and may maintain moral objections to certain contraceptives, so as to support including them in these expanded exemptions. The Departments seek to remove an obstacle that might prevent individuals with moral objections from forming or maintaining such small or closely held businesses and providing health coverage to their employees in accordance with their moral convictions.

In defining what constitutes a closely held for-profit entity to which these exemptions extend, the Moral IFC used language derived from the July 2015 final regulations. Those regulations, in offering the accommodation (not an exemption) to religious (not moral) closely held for-profit entities, did so by attempting to positively define what constitutes a closely held entity, formulating a multi-factor, and partially open-ended, definition for that purpose. (80 FR 41313). Any such positive definition runs up against the myriad state differences in defining such entities and potentially intrudes into a traditional area of state regulation of business organizations. Instead of attempting to positively define closely held businesses in the Moral IFC, however, the Departments considered it much clearer, effective, and preferable to define the category negatively, by reference to one element of the previous definition: that the entity has no publicly traded ownership interest (that is, any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934).

#### 4. Institutions of Higher Education (45 CFR 147.133(a)(1)(ii))

The previous regulations did not exempt plans arranged by institutions of higher education, although they did include, in the accommodation, plans ar-

<sup>190</sup>The lack of the limitation in this provision may be particularly relevant since it was enacted in the same statute, the ACA, as the provision under which the Mandate—and these exemptions to the Mandate—were promulgated.

ranged by institutions of higher education similarly to the way in which the regulations provided the accommodation to plans of nonprofit religious employers. (See 80 FR 41347). The Moral IFC provided an exemption, in § 147.133(a)(1)(ii), encompassing institutions of higher education that arrange student health insurance coverage, and stating the exemption would operate in a manner comparable to the exemption for employers with respect to plans they sponsor. In these final rules, the Departments finalize § 147.133(a)(1)(ii) with one change.

These rules treat the health plans of institutions of higher education that arrange student health insurance coverage similarly to the way in which the rules treat the plans of employers. The rules do so by making such student health plans eligible for the expanded exemptions, and by permitting them the option of electing to utilize the accommodation process. Thus, these rules specify, in § 147.133(a)(1)(ii), that the exemption is extended, in the case of institutions of higher education (as defined in 20 U.S.C. 1002) with objections to the Mandate based on sincerely held moral convictions, to their arrangement of student health insurance coverage, in a manner comparable to the exemption for group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor.

Some commenters supported including, in the exemptions, institutions of higher education that provide health coverage for students through student health plans but have moral objections to providing certain contraceptive coverage. They stated that moral exemptions allow freedom for certain institutions of higher education to exist, and this in turn gives students the choice of institutions that hold different views on important issues such as contraceptives and abortifacients. Other commenters opposed including the exemption, asserting that expanding the exemption would negatively impact female students because institutions of higher education might not cover contraceptives in student health plans, women enrolled in those plans would not receive access to birth control, and an increased number of unintended pregnancies would result.

In the Departments' view, the reasons for extending the exemption to institutions of higher education are similar to the reasons, discussed above, for extending the exemption to other nonprofit organizations. The Departments are not aware of any institutions of higher education that arrange student health insurance coverage and object to the Mandate based on non-religious moral convictions. But because the Departments have been sued by several institutions of higher education that arrange student health insurance coverage and object to the Mandate based on religious beliefs and by several nonprofit organizations with moral objections, the Departments believe the existence of institutions of higher education with non-religious moral objections, or the possible formation of such entities in the future, is sufficiently possible to justify including protections for such entities in these final rules.

The Departments conclude that this aspect of the exemption is likely to have a minimal impact on contraceptive coverage for women at institutions of higher education. As noted above, the Departments are not aware of any institutions of higher education that would currently qualify for the objection. In addition, only a minority of students in higher education receive health insurance coverage from plans arranged by their colleges or universities, as opposed to from other sources, and an even smaller number receive such coverage from schools objecting to contraceptive coverage. Exempting institutions of higher education that object to contraceptive coverage based on moral convictions does not affect student health insurance contraceptive coverage at the vast majority of institutions of higher education. The exemption simply makes it legal under federal law for institutions to adhere to moral convictions that oppose contraception, without facing penalties for non-compliance that could threaten their existence. This removes a possible barrier to diversity in the nation's higher education system, because it makes it easier for students to attend institutions of higher education that hold those views, if the institutions exist or come into being and students choose to attend them. Moreover, because institutions of higher education have no legal obligation to sponsor stu-

dent health insurance coverage, providing this moral exemption removes an obstacle to such institutions sponsoring student health insurance coverage, thus possibly encouraging more widespread health insurance coverage.

As noted above, after seeking public comment on whether the final moral exemptions rules should be extended to include non-federal governmental entities, the Departments have concluded they should only include non-governmental entities. For the same reasons, the Departments are inserting a reference into § 147.133(a)(1)(ii) specifying that it includes an institution of higher education "which is non-governmental." This language is parallel to the same limiting phrase used in the religious exemptions rule governing institutions of higher education, at § 147.132(a)(1)(ii). Thus, the first sentence of § 147.133(a)(1)(ii) is finalized to read: "An institution of higher education as defined in 20 U.S.C. 1002, which is non-governmental, in its arrangement of student health insurance coverage, to the extent that institution objects as specified in paragraph (a)(2) of this section." The remaining text of § 147.133(a)(1)(ii) is finalized without change.

#### 5. Health Insurance Issuers (45 CFR 147.133(a)(1)(iii))

The Moral IFC extended the exemption, in § 147.133(a)(1)(iii), to health insurance issuers offering group or individual health insurance coverage that sincerely hold their own moral convictions opposed to providing coverage for contraceptive services. The issuer exemption only applied to the group health plan if the plan itself was also exempt under an exemption for the plan sponsor or individuals. In these final rules, the Departments finalize § 147.133(a)(1)(iii) without change.

As discussed above, where the exemption for plan sponsors or institutions of higher education applies, issuers are exempt under those sections with respect to providing contraceptive coverage in those plans. The issuer exemption in § 147.133(a)(1)(iii) adds to that protection, but the additional protection operates in a different way than the plan sponsor exemption operates. The only plan sponsors—or in the case of individual insurance coverage, individu-

als—who are eligible to purchase or enroll in health insurance coverage offered by an exempt issuer that does not cover some or all contraceptive services, are plan sponsors or individuals who themselves object and whose plans are otherwise exempt based on that objection. An exempt issuer can then offer an exempt product to an entity or individual that is exempt based on either the moral exemptions for entities and individuals, or the religious exemptions for entities and individuals. Thus, the issuer exemption specifies that, where a health insurance issuer providing group health insurance coverage is exempt under paragraph (a)(1)(iii), the plan remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv), unless the plan is otherwise exempt from that requirement. Accordingly, the only plan sponsors, or in the case of individual insurance coverage, individuals, who are eligible to purchase or enroll in health insurance coverage offered by an exempt issuer under this paragraph (a)(1)(iii) that does not include some or all contraceptive services, are plan sponsors or individuals who themselves object and are exempt.

Under these rules, issuers that hold their own objections based on sincerely held moral convictions could issue policies that omit contraception to plan sponsors or individuals that are otherwise exempt based on their moral convictions, or if they are exempt based on their religious beliefs under the companion final rules published elsewhere in today's **Federal Register**. Likewise, issuers with sincerely held religious beliefs, that are exempt under those companion final rules, could likewise issue policies that omit contraception to plan sponsors or individuals that are otherwise exempt based on either their religious beliefs or their moral convictions.

Some commenters supported including this exemption for issuers in these rules, both to protect the moral convictions of issuers, and so that, in the future, issuers

would be free to organize that may wish to specifically serve plan sponsors and individuals that object to contraception based on religious or moral reasons. Other commenters objected to including an exemption for issuers. Some commenters stated that issuers cannot exercise moral convictions, while others stated that exempting issuers would threaten contraceptive coverage for women. Some commenters stated that it was arbitrary and capricious for the Departments to provide an exemption for issuers if they do not know that issuers with qualifying moral objections exist.

The Departments consider it appropriate to provide this exemption for issuers. Because the issuer exemption only applies where an independently exempt policyholder (entity or individual) is involved, the issuer exemption will not serve to remove contraceptive coverage obligations from any plan or plan sponsor that is not also exempt, nor will it prevent other issuers from being required to provide contraceptive coverage in individual or group insurance coverage.

The issuer exemption serves several interests, even though the Departments are not currently aware of existing issuers that would use it. As noted by some commenters, allowing issuers to be exempt, at least with respect to plan sponsors, plans, and individuals that independently qualify for an exemption, will remove a possible obstacle to issuers with moral convictions being organized in the future to serve entities and individuals that want plans that respect their religious beliefs or moral convictions. Furthermore, permitting issuers to object to offering contraceptive coverage based on sincerely held moral convictions will allow issuers to continue to offer coverage to plan sponsors and individuals, without subjecting them to liability under section 2713(a)(4), or related provisions, for their failure to provide contraceptive coverage. In this way, the issuer exemption serves to protect objecting issuers both from being required to

issue policies that cover contraception in violation of the issuers' sincerely held moral convictions and from being asked or required to issue policies that omit contraceptive coverage to non-exempt entities or individuals, thus subjecting the issuers to potential liability if those plans are not exempt from the Guidelines.

The Departments reject the proposition that issuers cannot exercise moral convictions. Many federal health care conscience laws and regulations protect issuers or plans specifically. For example, as discussed above, 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3) protect plans or managed care organizations in Medicare Advantage or Medicaid. The Weldon Amendment specifically protects, among other entities, HMOs, health insurance plans, and “any other kind of health care facility[ies], organization[s] or plan[s]” as a “health care entity” from being required to provide coverage of, or pay for, abortions. See, for example, Consolidated Appropriations Act, 2018, Pub. L. No. 115–141, Div. H, Sec. 507(d).<sup>191</sup> The most recently enacted Consolidated Appropriations Act declares that Congress supports a “conscience clause” to protect moral convictions concerning “the provision of contraceptive coverage by health insurance plans.” See *id.* at Div. E, Sec. 808.

The issuer exemption does not specifically include third party administrators, for the reasons discussed in the companion Religious IFC and final rules concerning religious beliefs issued contemporaneously with these final rules and published elsewhere in today's **Federal Register**.<sup>192</sup>

## 6. Description of the Moral Objection (45 CFR 147.133(a)(2))

The Moral IFC set forth the scope of the moral objection of objecting entities in § 147.133(a)(2), so that it applies to the extent an entity described in paragraph (a)(1), based on sincerely held moral convictions, objects to “establishing, maintaining, providing, offering, or arranging” either “coverage or payments” for contra-

<sup>191</sup>ACA section 1553 protects an identically defined group of “health care entities,” including provider-sponsored organizations, HMOs, health insurance plans, and “any other kind of . . . plan,” from being subject to discrimination on the basis that it does not provide any health care item or service furnishing for the purpose of assisted suicide, euthanasia, mercy killing, and the like. ACA section 1553, 42 U.S.C. 18113.

<sup>192</sup>The exemption for issuers, as outlined here, does not make a distinction among issuers based on whether they are publicly traded, unlike the plan sponsor exemption for employers. Because the issuer exemption operates more narrowly than the exemption for plan sponsors operates, in the ways described here (i.e., the issuer exemption does not operate unless the plan sponsor or individual, as applicable, is also exempt), and exists in part to help preserve market options for objecting plan sponsors and individuals, the Departments consider it appropriate to not draw such a distinction among issuers.



ceptives, or “for a plan, issuer, or third party administrator that provides or arranges such coverage or payments.” The Departments are finalizing this exemption with structural changes separating the second half of the sentence into separate subparagraphs, so as to more clearly specify, as set forth in the Moral IFC text, that the objection may pertain either to coverage or payments for contraceptives, or to a plan, issuer, or third party administrator that provides or arranges such coverage or payments.

Some commenters observed that, by allowing exempt plan sponsors to object to “some or all” contraceptives, this might yield a cafeteria-style approach where different plan sponsors choose various combinations of contraceptives that they wish to cover. Some commenters further observed that this might create a burden on issuers or third party administrators.

The Departments have concluded, however, that just as the previous exemption rules allowed certain religious plan sponsors to object to some or all contraceptives, it is appropriate to maintain that flexibility for entities covered by the expanded exemption. These rules do not require any issuer or third party administrator to contract with an exempt entity or individual if the issuer or third party administrator does not wish to do so, including because the issuer or third party administrator does not wish to offer an unusual plan variation. These rules simply remove the federal Mandate, in some cases, where it could have led to penalties on an employer, issuer, or third party administrator if they wished to sponsor, provide, or administer a plan that omits contraceptive coverage in the presence of a qualifying moral objection. That approach is consistent with the approach under the previous regulations, which did not require issuers and third party administrators to contract with exempt plans of houses of worship or integrated auxiliaries if they did not wish to do so.

The definition does not specify that the moral convictions that can support an exemption need to be non-religious moral convictions. We find it unnecessary to limit the definition in that way. Even though moral convictions need not be based on religious beliefs, religious beliefs can have a moral component. It is not

always clear whether a moral conviction is based on religious tenets. As noted in *Welsh*, a moral conviction can be “purely ethical or moral in source and content but that nevertheless . . . occupy in the life of that individual a place parallel to that filled by God [and] function as a religion in his life.” 398 U.S. at 340. One reason for providing exemptions for moral convictions is so that the government need not engage in the potentially difficult task of parsing which convictions are religious and which are not. If sincerely held moral convictions supporting an exemption are religious, they will be encompassed by the exemption for sincerely held religious beliefs. If the moral convictions are not also religious, or if their religious quality is unclear but they are ethical or moral, they can qualify as sincerely held moral convictions under these rules if the other requirements of these rules are met.

The Departments are not aware of any entities that qualify for an exemption under the religious exemptions finalized elsewhere in today’s **Federal Register**, but not under the moral exemptions finalized here, such as publicly traded entities. If publicly traded entities object to the Mandate, it seems unlikely their objection is based on moral convictions and not religious beliefs, given that many more objections to the Mandate have been based on religious beliefs. Thus, the Departments find it unlikely that they would be faced with a situation where a publicly traded entity, for example, has an objection to the contraceptive Mandate, but it is not clear whether that objection is based on sincerely held religious beliefs or merely based on sincerely held moral convictions.

#### 7. Individuals (45 CFR 147.133(b))

The previous regulations did not provide an exemption for objecting individuals. The Moral IFC provided such an exemption for objecting individuals (referred to here as the “individual exemption”), using the following language at § 147.133(b): “Objecting individuals”. Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to

individuals who object as specified in this paragraph (b), and nothing in § 147.130(a)(1)(iv), 26 CFR 54.9815–2713(a)(1)(iv), or 29 CFR 2590.715–2713(a)(1)(iv) may be construed to prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any individual who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions.”

The Departments finalize this language, with changes in response to public comments in some of the text and in a new sentence at the end of the paragraph that clarify how the exemption applies.

Section 147.133(b) sets forth a special rule pertaining to individuals (referred to here as the “individual exemption”). This rule exempts plans of certain individuals with moral objections to contraceptive coverage where the plan sponsor and, as applicable, issuer is willing to provide a plan compliant with the individuals’ objections to such plan sponsors or individuals, as applicable.

Some commenters supported this exemption as providing appropriate protections for the moral convictions of individuals who obtain their insurance coverage in such places as the individual market or exchanges, or who obtain coverage from a group health plan sponsor that does not object to coverage of contraceptives but is willing (and, as applicable, the issuer is also willing) to provide coverage consistent with an individual’s moral objections. They commented that this exemption would free individuals from having their moral convictions placed in tension with their desire for health coverage. They also contended that the individual exemption would not undermine any government interests behind the contraceptive Mandate, since the individuals would be choosing not to have the coverage. Some commenters also observed that, by specifying that the individual exemption only operates where the plan sponsor and issuer, as applicable, are willing to provide coverage that is consistent with the objection, the exemption would not impose burdens on

the insurance market because the possibility of such burdens would be factored into the willingness of an employer or issuer to offer such coverage.

Other commenters disagreed and contended that allowing the individual exemption would cause burden and confusion in the insurance market. Some commenters also suggested that the individual exemption should not allow the offering of a separate group health plan because doing so could cause various administrative burdens.

The Departments agree with the commenters who suggested the individual exemption will not burden the insurance market, and, therefore, conclude that it is appropriate to provide the individual exemption where a plan sponsor and, as applicable, issuer are willing to cooperate in doing so. The Departments note that this individual exemption only operates in the case where the issuer is willing to provide the separate option; in the case of coverage provided by a group health plan sponsor, where the plan sponsor is willing; or in the case where both a plan sponsor and issuer are involved, both are willing. The Departments conclude that it is appropriate to provide the individual exemption so that the Mandate will not serve as an obstacle among these various options. Practical difficulties that may be implicated by one option or another will likely be factored into whether plan sponsors and issuers are willing to offer particular options in individual cases. But the Departments do not wish to pose an obstacle to the offering of such coverage.

The Departments note that their decision is consistent with the decision by Congress to provide protections in certain contexts for individuals who object to prescribing or providing contraceptives contrary to their moral convictions. *See, for example*, Consolidated Appropriations Act of 2018, Div. E, Sec. 726(c) (Mar. 23, 2018). While some commenters argued that such express protections are narrow, Congress likewise provided that, if the District of Columbia requires “the provision of contraceptive coverage by health insurance plans,” “it is the intent of Congress that any legislation enacted on such issue should include a ‘conscience clause’ which provides exceptions for religious

beliefs and moral convictions”. *Id.* at Div. E, Sec. 808. A moral exemption for individuals would not be effective if the government did not, at the same time, permit issuers and group health plans to provide individuals with policies that comply with their moral convictions.

The individual exemption extends to the coverage unit in which the plan participant, or subscriber in the individual market, is enrolled (for instance, to family coverage covering the participant and his or her beneficiaries enrolled under the plan), but does not relieve the plan’s or issuer’s obligation to comply with the Mandate with respect to the group health plan generally, or, as applicable, to any other individual policies the issuer offers. Thus, this individual exemption allows plan sponsors and issuers that do not specifically object to contraceptive coverage to offer morally acceptable coverage to their participants or subscribers who do object, while offering coverage that includes contraception to participants or subscribers who do not object. The July 2013 regulations stated that, because employees of objecting houses of worship and integrated auxiliaries are relatively likely to oppose contraception, exempting those organizations “does not undermine the governmental interests furthered by the contraceptive coverage requirement.” (78 FR 39874). For parallel reasons, as the Departments stated in the Moral IFC (83 FR at 47853 through 47854), this individual exemption does not undermine the governmental interests furthered by the contraceptive coverage requirement, because, when the exemption is applicable, the individual does not want the coverage, and therefore would not use the objectionable items even if they were covered.

This individual exemption can apply with respect to individuals in plans sponsored by private employers or governmental employers. For example, in one case brought against the Departments, the State of Missouri enacted a law under which the state is not permitted to discriminate against insurance issuers that offer group health insurance policies without coverage for contraception based on employees’ religious beliefs “or moral convictions,” or against the individual employees who accept such offers. *See Wieland*, 196 F. Supp. 3d at 1015–16 (quoting Mo. Rev. Stat.

191.724). Under the individual exemption in these rules, employers sponsoring governmental plans would be free to honor the moral objections of individual employees by offering them plans that omit contraceptive coverage, even if those governmental entities do not object to offering contraceptive coverage in general.

In the separate companion IFC to the Moral IFC—the Religious IFC—the Departments, at § 147.133(b), provided a similar individual exemption, but we used slightly different operative language. Where the Moral IFC said a willing issuer and plan sponsor may offer “a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any individual who objects” under the individual exemption, the Religious IFC described what may be offered to objecting individuals as “a separate benefit package option, or a separate policy, certificate or contract of insurance.” Some commenters observed this difference and asked whether the language was intended to encompass the same options. The Departments intended these descriptions to include the same scope of options. Some commenters suggested that the individual exemption should not allow the offering of “a separate group health plan,” because doing so could cause various administrative burdens. The Departments disagree, since group health plan sponsors and group and individual health insurance issuers would be free to decline to provide that option, including because of administrative burdens. In addition, the Departments wish to clarify that, where an employee claims the exemption, a willing issuer and a willing employer may, where otherwise permitted, offer the employee participation in a group health insurance policy or benefit option that complies with the employee’s objection. Consequently, these rules finalize the individual exemption by making a technical change to the language to adopt the formulation, “a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects.”

This individual exemption cannot be used to force a plan (or its sponsor) or an issuer to provide coverage omitting con-

traception, or, with respect to health insurance coverage, to prevent the application of state law that requires coverage of such contraceptives or sterilization. Nor can the individual exemption be construed to require the guaranteed availability of coverage omitting contraception to a plan sponsor or individual who does not have a sincerely held moral objection. This individual exemption is limited to the requirement to provide contraceptive coverage under section 2713(a)(4), and does not affect any other federal or state law governing the plan or coverage. Thus, if there are other applicable laws or plan terms governing the benefits, these rules do not affect such other laws or terms.

The Departments received numerous comments about the administrative burden from the potential variations in moral convictions held by individuals. Some commenters welcomed the ability of individuals covered by the individual exemption to be able to assert an objection to either some or all contraceptives, while others expressed concern that the variations in the kinds of contraceptive coverage to which individuals object might make it difficult for willing plan sponsors and issuers to provide coverage that complies with the moral convictions of an exempt individual.

If an individual only objects to some contraceptives, and the individual's issuer and, as applicable, plan sponsor are willing to provide the individual a package of benefits omitting such coverage, but for practical reasons can only do so by providing the individual with coverage that omits all—not just some—contraceptives, the Departments believe that it favors individual freedom and market choice, and does not harm others, to allow the issuer and plan sponsor to provide, in that case, a plan omitting all contraceptives if the individual is willing to enroll in that plan. The language of the individual exemption set forth in the Moral IFC implied this conclusion by specifying that the Guidelines requirement of contraceptive coverage did not apply where the individual objected to some or all contraceptives. Notably, that language differed from the language applicable to the exemptions under § 147.133(a), which specifies that those exemptions apply “to the extent” of the moral objections, so that, as discussed

above, they include only those contraceptive methods to which the objection applied. In response to comments suggesting the language of the individual exemption was not sufficiently clear on this distinction, however, the Departments in these rules finalize the individual exemption at § 147.133(b), with the following change, by adding the following sentence at the end of the paragraph: “Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.”

Some commenters asked for plain language guidance and examples about how the individual exemption might apply in the context of employer-sponsored insurance. Here is one such example. An employee is enrolled in group health coverage through her employer. The plan is fully insured. If the employee has sincerely held moral convictions objecting to her plan including coverage for contraceptives, she could raise this with her employer. If the employer is willing to offer her a plan that omits contraceptives, the employer could discuss this with the insurance agent or issuer. If the issuer is also willing to offer the employer, with respect to the employee, a group health insurance policy that omits contraceptive coverage, the individual exemption would make it legal for the group health insurance issuer to omit contraceptives for her and her beneficiaries under her policy, for her employer to sponsor that plan for her, and for the issuer to issue such a plan to the employer, to cover that employee. This would not affect other employees' plans—those plans would still be subject to the Mandate and would continue to cover contraceptives. But if either the employer, or the issuer, is not willing (for whatever reason) to offer a plan or a policy for that employee that omits contraceptive coverage, these rules do not require them to do so. The employee would have the choice of staying enrolled in a plan with its coverage of contraceptives, not en-

rolling in that plan, seeking coverage elsewhere, or seeking employment elsewhere.

For all these reasons, these rules adopt the individual exemption language from the Religious IFC with changes, to read as follows: “(b) *Objecting individuals.* Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to individuals who object as specified in this paragraph (b), and nothing in § 147.130(a)(1)(iv), 26 CFR 54.9815–2713(a)(1)(iv), or 29 CFR 2590.715–2713(a)(1)(iv) may be construed to prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions. Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.”

8. Accommodation (45 CFR 147.131, 26 CFR 54.9815–2713A, 29 CFR 2590.715–2713A)

The previous regulations did not offer the accommodation process to entities with moral non-religious objections. The Religious IFC amended the accommodation regulations to offer it to all entities that are exempt on the basis of religious beliefs under § 147.132, as an optional process in which such entities could participate voluntarily. The Moral IFC did not change that accommodation process, but inserted references in it to the new section § 147.133, alongside the references to section § 147.132. These changes made entities eligible for the voluntary



accommodation process if they are exempt on the basis of moral convictions. The references were inserted in 45 CFR 147.131, 26 CFR 54.9815–2713A, and 29 CFR 2590.715–2713A.

In these rules, the Departments finalize, without change, the Moral IFC’s revisions of 45 CFR 147.131, 26 CFR 54.9815–2713A, and 29 CFR 2590.715–2713A. The operation of the accommodation process, changes made in the Religious IFC, and public comments concerning the accommodation, are more fully described in the Religious IFC, and in the companion final rules concerning the religious exemptions and accommodation, published elsewhere in today’s **Federal Register**. Those descriptions are incorporated here by reference to the extent they apply to these rules.

Many commenters supported extending the accommodation process to entities with objections based on moral convictions. Others objected to doing so, raising arguments parallel to their objections to creating exemptions for group health plan sponsors with moral convictions. For much the same reasons discussed above concerning why the Departments find it appropriate to exempt entities with moral objections to contraceptive coverage, the Departments find it appropriate to extend the optional accommodation process to these entities. The Departments observe that, to the extent such entities wish to use the process, it will not be an obstacle to contraceptive coverage, but will instead help deliver contraceptive coverage to women who receive health coverage from such entities while respecting the moral convictions of the entities. The Departments are not aware of entities with non-religious moral convictions against contraceptive coverage that also consider the accommodation acceptable and would opt into it, but we are aware of a small number of entities with non-religious moral objections to the Mandate. The Departments, therefore, continue to consider it appropriate to extend the optional accommodation to such entities in case any wish to use it. Below,

albeit based on very limited data, the Departments estimate that a small number of entities with non-religious moral objections may use the accommodation process.

#### 9. Definition of Contraceptives for the Purpose of These Final Rules

The previous regulations did not define contraceptive services. The Guidelines issued in 2011 included, under “Contraceptive methods and counseling,” “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” The previous regulations concerning the exemption and the accommodation used the terms “contraceptive services” and “contraceptive coverage” as catch-all terms to encompass all of those Guidelines requirements. The 2016 update to the Guidelines are similarly worded. Under “Contraception,” they include the “full range of contraceptive methods for women currently identified by the U.S. Food and Drug Administration,” “instruction in fertility awareness-based methods,” and “[c]ontraceptive care” to “include contraceptive counseling, initiation of contraceptive use, and follow-up care (e.g., management, and evaluation as well as changes to and removal or discontinuation of the contraceptive method).”<sup>193</sup>

To more explicitly state that the expanded exemptions encompass any of the contraceptive or sterilization services, items, procedures, or related patient education or information that have been required under the Guidelines, the Moral IFC included a definition of contraceptive services, benefits or coverage, at 45 CFR 147.133(c). These rules finalize that definition without change.

#### 10. Severability

The Departments finalize, without change, the severability clause set forth at § 147.133(d).

#### C. Other Public Comments

##### 1. Items Approved as Contraceptives But Used to Treat Existing Conditions

Some commenters noted that some drugs included in the preventive services contraceptive Mandate can also be useful for treating certain existing health conditions, and that women use them for non-contraceptive purposes. Certain commenters urged the Departments to clarify that the final rules do not permit employers to exclude from coverage medically necessary prescription drugs used for non-preventive services. Some commenters suggested that moral objections to the Mandate should not be permitted in cases where contraceptive methods are used to treat such existing medical conditions and not for preventive purposes, even if those contraceptive methods can also be used for contraceptive purposes.

Section 2713(a)(4) only applies to “preventive” care and screenings. The statute does not allow the Guidelines to mandate coverage of services provided solely for a non-preventive use, such as the treatment of an existing condition. The Guidelines implementing this section of the statute are consistent with that narrow authority. They state repeatedly that they apply to “preventive” services or care.<sup>194</sup> The requirement in the Guidelines concerning “contraception” specifies several times that it encompasses “contraceptives,” that is, medical products, methods, and services applied for “contraceptive” uses. The Guidelines do not require coverage of care and screenings that are non-preventive, and the contraception portion of those Guidelines do not require coverage of medical products, methods, care, and screenings that are non-contraceptive in purpose or use. The Guidelines’ inclusion of contraceptive services requires coverage of contraceptive methods as a type of preventive service only when a drug that FDA has approved for contraceptive use is prescribed in whole or in part for such purpose or intended use. Section 2713(a)(4) does not authorize the Departments to require coverage of drugs prescribed exclusively for a non-contraceptive

<sup>193</sup>“Women’s Preventive Services Guidelines,” HRSA (last reviewed Oct. 2017), <https://www.hrsa.gov/womens-guidelines-2016/index.html>

<sup>194</sup>*Id.*

and non-preventive use to treat an existing condition.<sup>195</sup> The extent to which contraceptives are covered to treat non-preventive conditions would be determined by application of the requirement section 1302(b)(1)(F) of the ACA to cover prescription drugs (where applicable), implementing regulations at 45 CFR 156.122, and 156.125, and plans' decisions about the basket of medicines to cover for these conditions.

Some commenters observed that pharmacy claims do not include a medical diagnosis code, so that plans may be unable to discern whether a drug approved by FDA for contraceptive uses is actually applied for a preventive or contraceptive use. Section 2713(a)(4), however, draws a distinction between preventive and other kinds of care and screenings. That subsection does not authorize the Departments to impose a coverage mandate of services that are not at least partly applied for a preventive use, and the Guidelines themselves do not require coverage of care unless it is contraceptive in purpose. These rules do not prohibit issuers from covering drugs and devices that are approved for contraceptive uses even when those drugs and devices are prescribed for non-preventive, non-contraceptive purposes. As discussed above, these final rules do not purport to delineate the items HRSA will include in the Guidelines, but only concern expanded exemptions and accommodations that apply if the Guidelines require contraceptive coverage. Therefore, the Departments do not consider it appropriate to specify in these final rules that, under section 2713(a)(4), exempt organizations must provide coverage for drugs or items prescribed exclusively for a non-contraceptive and non-preventive use to treat an existing condition.

## 2. Comments Concerning Regulatory Impact

Some commenters agreed with the Departments' statement in the Moral IFC that the moral exemptions are likely to

affect only a very small number of women otherwise receiving coverage under the Mandate. Other commenters disagreed, stating that the exemptions could take contraceptive coverage away from many or most women. Still others opposed establishing the exemptions, but contended that accurately determining the number of women affected by the exemptions is not possible. Public comments included various statements that these exemptions would impact coverage for a large number of women, while others stated they would affect only a very small number. But few, if any, public commenters provided data predicting a precise number of entities that would make use of the exemptions for moral convictions nor a precise number of employees that would potentially be affected.

After reviewing the public comments, the Departments do not find the suggestions of commenters who predicted a very large impact any more reliable than the estimates set forth in the Religious and Moral IFCs. Therefore, the Departments conclude that the estimates of regulatory impact made in the Religious and Moral IFCs are still the best estimates available. The Departments' estimates are discussed in more detail in the following section.

## III. Economic Impact and Paperwork Burden

The Departments have examined the impacts of these final rules as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354, section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)) and Executive Order

13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

### A. Executive Orders 12866 and 13563—Department of HHS and Department of Labor

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a regulation: (1) having an annual effect on the economy of \$100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as "economically significant"); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year), and an "economically significant" regulatory action is subject to review by OMB. As discussed below regarding their anticipated effects, these final rules are not likely to have economic impacts of \$100 million or more in any

<sup>195</sup>The Departments previously cited the IOM's listing of existing conditions that contraceptive drugs can be used to treat (menstrual disorders, acne, and pelvic pain), and said of those uses that "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy." 77 FR 8727 & n.7. This was not, however, an assertion that section 2713(a)(4) or the Guidelines require coverage of "contraceptive" methods when prescribed for an exclusively non-contraceptive, non-preventive use. Instead, it was an observation that such drugs—generally referred to as "contraceptives"—also have some alternate beneficial uses to treat existing conditions. For the purposes of these final rules, the Departments clarify here that the previous reference to the benefits of using contraceptive drugs exclusively for some non-contraceptive and non-preventive uses to treat existing conditions did not mean that the Guidelines require coverage of such uses, and consequently is not a reason to refrain from offering the exemptions provided here. Where a drug approved by the FDA for contraceptive use is prescribed for both a contraceptive use and a non-contraceptive use, the Guidelines (to the extent they apply) would require its coverage. Where a drug approved by the FDA for contraceptive use is prescribed exclusively for a non-contraceptive and non-preventive use to treat an existing condition, it would be outside the scope of the Guidelines and the contraceptive Mandate.

one year, and therefore do not meet the definition of “economically significant” under Executive Order 12866. However, OMB has determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order. Therefore, OMB has reviewed these final rules and the Departments have provided the following assessment of their impact.

### 1. Need for Regulatory Action

The Religious IFC amended the Departments’ July 2015 final regulations. The Moral IFC amended those regulations further, and added an additional rule at 45 CFR part 147.133. These final rules adopt as final, and further amend, the amendments made by the Moral IFC. The Departments do so in conjunction with the amendments made in the companion final rules concerning religious beliefs published elsewhere in today’s **Federal Register**. These rules provide an exemption from the requirement to provide coverage for contraceptives and sterilization, established under the HRSA Guidelines, promulgated under section 2713(a)(4), section 715(a)(1) of the ERISA, and section 9815(a)(1) of the Code, for certain entities and individuals with objections to compliance with the Mandate based on sincerely held moral convictions, and they revise the accommodation process by making the accommodation applicable to organizations with such convictions as an option. The exemption applies to certain individuals, nonprofit entities, institutions of higher education, issuers, and for-profit entities that do not have publicly traded ownership interests, that have a moral objection to some (or all) of the contraceptive and/or sterilization services covered by the Guidelines. Such action has been taken to provide for participation in the health insurance market by certain entities or individuals in a manner free from penalties for violating sincerely held moral convictions opposed to providing or receiving coverage of contraceptive services, to ensure the preventive services

coverage requirement is implemented in a way consistent with longstanding federal conscience statutes, to prevent lawsuits of the kind that were filed against the Departments when the expanded exemption in these final rules was not offered, and for the other reasons discussed above.

### 2. Anticipated Effects

The Departments acknowledge that expanding the exemption to include objections based on moral convictions might result in less insurance coverage of contraception for some women who may want the coverage. Although the Departments do not know the exact scope of that effect attributable to the moral exemption in these final rules, we believe it to be small.

With respect to the exemption for nonprofit organizations with objections based on moral convictions, as noted above, the Departments are aware of two small nonprofit organizations that have filed lawsuits raising non-religious moral objections to coverage of some contraceptives. Both of those entities have fewer than five employees enrolled in health coverage, and both require all of their employees to agree with their opposition to the nature of certain contraceptives subject to coverage under the Mandate.<sup>196</sup> One of them has obtained a permanent injunction against any regulations implementing the contraceptive Mandate, and so will not be affected by these final rules. Based on comments submitted in response to rule-makings prior to the Moral and Religious IFCs, the Departments believe that at least one other similar entity exists.<sup>197</sup> However, the Departments do not know how many similar entities exist and are currently unable to estimate the number of such entities. Lacking other information, we assume that the number is small. The Departments estimate it to be less than 10 and assume the exemption will be used by nine nonprofit entities.

The Departments also assume that those nine entities will operate in a fash-

ion similar to the two similar entities of which we are aware, so that their employees will likely share their views against coverage of certain contraceptives. This is consistent with the conclusion in previous regulations that no significant burden or costs would result from exempting houses of worship and integrated auxiliaries. (See 76 FR 46625 and 78 FR 39889). The Departments reached that conclusion without ultimately requiring that houses of worship and integrated auxiliaries only hire persons who agree with their views against contraception and without requiring that such entities actually oppose contraception in order to be exempt (in contrast, the exemption here requires the exempt entity to actually possess sincerely held moral convictions objecting to contraceptive coverage). In concluding that the exemption for houses of worship and integrated auxiliaries would result in no significant burden or costs, the Departments relied on the assumption that the employees of exempt houses of worship and integrated auxiliaries likely share their employers’ opposition to contraceptive coverage.

A similar assumption is appropriate with respect to the expanded exemption for nonprofit organizations with objections based on moral convictions. To the knowledge of the Departments, the vast majority of organizations objecting to the Mandate assert objections based on religious beliefs. The only nonprofit organizations of which they are aware that possess non-religious moral convictions against some or all contraceptive methods only hire persons who share their convictions. It is possible that the exemption for nonprofit organizations with moral convictions in these final rules could be used by a nonprofit organization that employs persons who do not share the organization’s views on contraception, but it was also possible under the Departments’ previous regulations that a house of worship or integrated auxiliary could employ persons who do not share their views on contraception.<sup>198</sup> Although the Depart-

<sup>196</sup>Non-religious nonprofit organizations that engage in expressive activity generally have a First Amendment right to hire only people who share their moral convictions or will be respectful of them—including their convictions on whether the organization or others provide health coverage of contraception, or of certain items they view as being abortifacient.

<sup>197</sup>See, for example, Americans United for Life (“AUL”) Comment on CMA-9992-IFC2 at 10 (Nov. 1, 2011), available at <http://www.regulations.gov/#!documentDetail;D=HHS-OS-2011-0023-59496>, and AUL Comment on CMS-9968-P at 5 (Apr. 8, 2013), available at <http://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-79115>.

<sup>198</sup>*Cf.*, for example, Frank Newport, “Americans, Including Catholics, Say Birth Control Is Morally OK,” Gallup, (May 22, 2012), <http://www.gallup.com/poll/154799/americans-including->



ments are unable to find sufficient data on this issue, we believe that there are far fewer nonprofit organizations opposed to contraceptive coverage on the basis of moral convictions than there are houses of worship or integrated auxiliaries with religious objections to such coverage. Based on the limited data available, the Departments believe the most likely effect of the expanded exemption for nonprofit entities is that it will be used by entities similar to the two entities that have sought an exemption through litigation, and whose employees also oppose certain contraceptive coverage. Therefore, the Departments expect that the moral exemption for nonprofit entities will have a minimal effect of reducing contraceptive coverage with respect to employees who want such coverage.

These rules extend the exemption to include institutions of higher education that arrange student coverage and have non-religious moral objections to the Mandate, and make exempt entities with moral objections eligible to avail themselves of the accommodation. The Departments are not aware of any institutions of higher education with this kind of non-religious moral convictions. Moreover, the Departments believe the overall number of entities that would object to the Mandate based on non-religious moral convictions is already very small. The only entities of which we are aware that have raised such objections are not institutions of higher education. Public comments did not reveal the existence of any institutions of higher education with such moral convictions. Therefore, for the purposes of estimating the anticipated effect of these final rules on contraceptive coverage of women who wish to receive such coverage, the Departments assume that—at this time—no entities with non-religious moral objections to the Mandate will be institutions of higher education that arrange student coverage, and no other entities with non-religious moral objections will opt into the accommodation. We wish to make the expanded exemption and accommodation available to such entities in case they do exist or might come into existence, based on reasons similar to

those given above for why the exemptions and accommodations are extended to other entities.

The Departments believe that the exemption for issuers with objections based on moral convictions will not result in a distinct effect on contraceptive coverage for women who wish to receive it, because that exemption only applies in cases where plan sponsors or individuals are also otherwise exempt, and the effect of those exemptions is discussed elsewhere herein, or in the companion final rules concerning religious beliefs published elsewhere in today's **Federal Register**. The exemption for individuals that oppose contraceptive coverage based on sincerely held moral convictions will provide coverage that omits contraception for individuals that object to contraceptive coverage.

The moral exemption will also cover for-profit entities that do not have publicly traded ownership interests and that have non-religious moral objections to the Mandate, if such entities exist. Some commenters agreed that the impact of these final rules would be no more than the Departments estimated in the Moral IFC, and some commenters stated the impact would be much smaller. Other commenters disagreed, suggesting that the expanded exemptions risked removing contraceptive coverage from more than 55 million women receiving the benefits of the preventive services Guidelines, or even risked removing contraceptive coverage from over 100 million women. Some commenters cited studies indicating that, nationally, unintended pregnancies have large public costs, and the Mandate overall led to large out-of-pocket savings for women. These general comments did not, however, substantially assist the Departments in estimating the number of women that would potentially be affected by these exemptions for moral convictions specifically, or among them, how many unintended pregnancies would result, how many of the affected women would nevertheless use contraceptives not covered under the health plans of their objecting employers and, thus, be subject to the estimated transfer costs, or instead, how many women might avoid unintended

pregnancies by changing their activities in other ways besides using contraceptives.

Some of the comments opposing these exemptions assert that they will lead to a large number of entities dropping contraceptive coverage. The Departments disagree; they are aware of only two entities that hold non-religious moral convictions against contraceptive coverage. Both only hire employees that share their beliefs, and one will not be affected by these final rules because it is protected by an injunction from any regulations implementing the contraceptive Mandate. Commenters cited no other specific entities that might assert these moral convictions, and did not provide better data to estimate how many entities might exist. Likewise, the Departments find it unlikely that any of the vast majority of entities that covered contraceptives before this Mandate was announced in 2011 would terminate such coverage because of these exemptions based on moral convictions. The Departments also find it unlikely that a significant number of for-profit entities, whose plans include a significant number of women, omitted contraceptive coverage before the ACA on the basis of objections grounded in non-religious moral convictions, and would claim an exemption under these final rules. No such entities, or data concerning such entities, were identified by public commenters, nor are the Departments aware of any involved in litigation over the Mandate.

Numerous for-profit entities claiming religious objections have filed suit challenging the Mandate. Among the over 200 entities that brought legal challenges, only two entities (less than 1 percent) raised non-religious moral objections—and both were nonprofit organizations. Among the general public, polls vary about religious beliefs, but one prominent poll shows that 89 percent of Americans say they believe in God.<sup>199</sup> Among non-religious persons, only a very small percentage of the population appears to hold moral objections to contraception. A recent study found that only 2 percent of religiously unaffiliated persons believed using contracep-

[catholics-say-birth-control-morally.aspx](#) ("Eighty-two percent of U.S. Catholics say birth control is morally acceptable").

<sup>199</sup>Frank Newport, "Most Americans Still Believe in God," Gallup (June 29, 2016), <http://www.gallup.com/poll/193271/americans-believe-god.aspx>.

tives is morally wrong.<sup>200</sup> Combined, this suggests that 0.2 percent of Americans at most<sup>201</sup> might believe contraceptives are morally wrong based on moral convictions but not religious beliefs. The Departments have no information about how many of those persons run closely held businesses, offer employer sponsored health insurance, and would make use of the expanded exemption for moral convictions set forth in these final rules. Given the large number of closely held entities that challenged the Mandate based on religious objections, the Departments assume that some similar for-profit entities with non-religious moral objections exist. But the Departments expect that it will be a comparatively small number of entities, since among the nonprofit litigants, only two were non-religious. Without data available to estimate the actual number of entities that will make use of the expanded exemption for for-profit entities without publicly traded ownership interests and with sincere moral objections to the Mandate, the Departments expect that fewer than 10 entities, if any, will do so—so the Departments assume nine for-profit entities will use the exemption in these final rules.

The moral exemption encompassing certain for-profit entities could result in the removal of contraceptive coverage from women who do not share their employers' views. The Departments used data from the Current Population Survey (CPS) and the Medical Expenditure Panel Survey-Insurance Component (MEPS-IC) to obtain an estimate of the number of policyholders that will be covered by the

plans of the nine for-profit entities we assume may make use of these expanded exemptions.<sup>202</sup> The average number of policyholders (9) in plans with under 100 employees was obtained. It is not known how many employees would be employed by the for-profit employers that might claim this exemption, but as discussed above these final rules do not include publicly traded companies, and both of the two nonprofit entities that challenged the Mandate based on moral objections included fewer than five policyholders in their group plans. Therefore, the Departments assume that the for-profit entities that may claim this expanded exemption will have fewer than 100 employees and an average of 9 policyholders. For 9 entities, the total number of policyholders would be approximately 81. DOL estimates that for each policyholder, there is approximately one dependent.<sup>203</sup> This amounts to approximately 162 covered persons. Census data indicate that women of childbearing age, i.e., women aged 15 to 44, comprise 20.2 percent of the general population.<sup>204</sup> This amounts to approximately 33 women of childbearing age for this group of individuals covered by group plans sponsored by for-profit moral objectors. Approximately 44.3 percent of women currently use contraceptives covered by the Guidelines.<sup>205</sup> Thus, the Departments estimate that approximately 15 women may incur contraceptive costs due to for-profit entities using the expanded moral exemption provided for in these final rules.<sup>206</sup> In the companion final rules concerning religious beliefs issued contemporaneously with these final

rules and published elsewhere in today's **Federal Register**, we estimate that the average cost of contraception per year per woman of childbearing age that use contraception covered by the Guidelines, in health plans that cover contraception, is \$584. Consequently, the Departments estimate that the anticipated effects attributable to the cost of contraception from for-profit entities using the expanded moral exemption in these final rules is approximately \$8,760.

The Departments estimate that these final rules will not result in any additional burden or costs on issuers or third party administrators. As discussed above, we assume that no entities with non-religious moral convictions will avail themselves of the accommodation, although the Departments wish to make it available in case an entity voluntarily opts into it in order to allow contraceptive coverage to be provided to its plan participants and beneficiaries. While these final rules make it legal for issuers to offer insurance coverage that omits contraceptives to/for exempt entities and individuals, these final rules do not require issuers to do so. Finally, because the accommodation process was not previously available to entities that possess non-religious moral objections to the Mandate, the Departments do not anticipate that these final rules will result in any burden from such entities acting to revoke their accommodated status.

The Departments believe the foregoing analysis represents a reasonable estimate of the likely impact under the exemptions finalized in these final rules. The Depart-

<sup>200</sup>Pew Research Center, "Where the Public Stands on Religious Liberty vs. Nondiscrimination," Pew Research Center, 26 (Sept. 28, 2016), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2016/09/Religious-Liberty-full-for-web.pdf>.

<sup>201</sup>The study defined religiously "unaffiliated" as agnostic, atheist or "nothing in particular", *id.* at 8, as distinct from several versions of Protestants, or Catholics. "Nothing in particular" might have included some theists.

<sup>202</sup>"Health Insurance Coverage Bulletin," Dept. of Labor (June 28, 2016), Table 4, page 21. Using March 2015 Annual Social and Economic Supplement to the Current Population Survey. <https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2015.pdf> Estimates of the number of ERISA Plans based on 2015 Medical Expenditure Survey - Insurance

<sup>203</sup>"Health Insurance Coverage Bulletin" Dept. of Labor" (June 28, 2016), Table 4, page 21. Using March 2015 Annual Social and Economic Supplement to the Current Population Survey. <https://www.dol.gov/sites/default/files/ebsa/researchers/data/health-and-welfare/health-insurance-coverage-bulletin-2015.pdf>.

<sup>204</sup>U.S. Census Bureau, "Age and Sex Composition: 2010" (May 2011), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. The Guidelines' requirement of contraceptive coverage only applies "for all women with reproductive capacity." Women's Preventive Services Guidelines, HRSA (last reviewed Oct. 2017), <https://www.hrsa.gov/womensguidelines/>; see also 80 FR 40318. In addition, studies commonly consider the 15–44 age range to assess contraceptive use by women of childbearing age. See, e.g., "Contraceptive Use in the United States," The Guttmacher Institute (Sept. 2016), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

<sup>205</sup>See "Contraceptive Use in the United States," The Guttmacher Institute (Sept. 2016), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

<sup>206</sup>The Departments note that many non-religious for-profit entities which sued the Departments challenging the Mandate, including some of the largest employers, only objected to coverage of 4 of the 18 types of contraceptives required to be covered by the Mandate—namely, those contraceptives which they viewed as abortifacients, and akin to abortion—and they were willing to provide coverage for other types of contraception. It is reasonable to assume that this would also be the case with respect to some for-profits that object to the Mandate on the basis of sincerely held moral convictions. Accordingly, it is possible that even fewer women beneficiaries under such plans would bear out-of-pocket expenses in order to obtain contraceptives, and that those who might do so would bear lower costs due to many contraceptive items being covered.

ments acknowledge uncertainty in the estimate and, therefore, conducted a second analysis using an alternative framework, which is set forth in the companion final rules concerning religious beliefs issued contemporaneously with these final rules and published elsewhere in today's **Federal Register**, with reference to the analysis conducted in the Religious IFC. Under either estimate, these final rules are not deemed to be economically significant.

The Departments reiterate the rareness of instances in which we are aware that employers assert non-religious objections to contraceptive coverage based on sincerely held moral convictions, as discussed above, and also that in the few instances where such an objection has been raised, employees of such employers also opposed contraception.

#### *B. Special Analyses—Department of the Treasury*

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

#### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) imposes certain requirements with respect to federal regulations that are subject to the notice and comment requirements of section 553(b) of the APA (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Under section 553(b) of the APA, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The Moral IFC was a set of interim final rules with comment, and in these final rules, the Departments finalize the Moral IFC with certain changes based on public comments. The Moral IFC was exempt from the notice and comment requirements of the APA, both because the PHS Act, ERISA, and the Code contain specific pro-

visions under which the Secretaries may adopt regulations by interim final rule and because the Departments have made a good cause finding that a general notice of proposed rulemaking is not necessary earlier in this preamble. Therefore, the RFA did not apply to the Moral IFC. These final rules are, however, issued after a notice and comment period.

The Departments carefully considered the likely impact of the rules on small entities in connection with their assessment under Executive Order 12866. The Departments do not expect that these final rules will have a significant economic effect on a substantial number of small entities, because they will not result in any additional costs to affected entities. Instead, by exempting from the Mandate small businesses and nonprofit organizations with moral objections to some or all contraceptives and/or sterilization—businesses and organizations which would otherwise be faced with the dilemma of complying with the Mandate (and violating their moral convictions), or of following their moral convictions and incurring potentially significant financial penalties for noncompliance—the Departments have reduced regulatory burden on small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### *D. Paperwork Reduction Act—Department of Health and Human Services*

Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** and solicit public comment before a collection of information is submitted to the Office of Management and Budget (OMB) for review and approval. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the

quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

The Departments estimate that these final rules will not result in additional burdens not accounted for as set forth in companion final rules concerning religious beliefs issued contemporaneously with these final rules and published elsewhere in today's **Federal Register**. As discussed there, rules covering the accommodation include provisions regarding self-certification or notices to HHS from eligible organizations (§ 147.131(c)(3)), notice of availability of separate payments for contraceptive services (§ 147.131(e)), and notice of revocation of accommodation (§ 147.131(c)(4)). The burden related to these information collection requirements (ICRs) received emergency review and approval under OMB Control Number 0938-1344. They have been resubmitted to OMB in conjunction with this final rule and are pending re-approval.

As discussed above, however, the Departments assume that no entities with non-religious moral objections to the Mandate will use the accommodation. The Departments know that no such entities were eligible for it until now, so that no entity possesses an accommodated status that would need to be revoked. Therefore, the Departments believe that the burden for these ICRs is accounted for in the collection approved under OMB Control Numbers 0938-1344, as described in the final rules concerning religious beliefs issued contemporaneously with these final rules.

#### *E. Paperwork Reduction Act—Department of Labor*

Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. In accordance with the requirements of the PRA, the ICR for the EBSA Form 700 and alternative notice have previously been approved by OMB under control numbers 1210-0150 and 1210-0152. In an effort to consolidate the number of information collections the Department is com-



binning OMB control numbers 1210-0150 and 1210-0152 under OMB control number 1210-0150 and discontinuing OMB control number 1210-0152.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>. PRA ADDRESSEE: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N-5718, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-4745. (These are not toll-free numbers).

Consistent with the analysis in the HHS PRA section above, although these final rules make entities with certain moral convictions eligible for the accommodation, the Department assumes (1) that no entities will use the accommodation rather than the exemption, and (2) entities using the moral exemption would not have to revoke an accommodation, because they previously were not eligible for it. Therefore, the Department believes these final rules do not involve additional burden not accounted for under OMB control number 1210-0150, which is published elsewhere in today's issue of the **Bulletin** in connection with the companion Religious Exemption and Accommodation Preventive Health Service final rule. The Department will publish a notice informing the public of OMB's action with respect to the Department's submission of the ICRs under OMB control number 1210-0150.

#### *F. Regulatory Reform Executive Orders 13765, 13771 and 13777*

Executive Order 13765 (January 20, 2017) directs that, “[t]o the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the [Affordable Care] Act shall exercise all authority and discretion available to them

to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any state or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.” In addition, agencies are directed to “take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the [Affordable Care Act], and prepare to afford the States more flexibility and control to create a more free and open healthcare market.” The Moral IFC and these final rules exercise the discretion provided to the Departments under the Affordable Care Act and other laws to grant exemptions and thereby minimize regulatory burdens of the Affordable Care Act on the affected entities and recipients of health care services.

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), the Departments have estimated the costs and cost savings attributable to these rules. As discussed in more detail in the preceding analysis, these final rules lessen incremental reporting costs.<sup>207</sup> However, in order to avoid double-counting with the Moral IFC, which has already been tallied as an EO 13771 deregulatory action, this finalization of the IFC's policy is not considered a deregulatory action under the Executive Order.

#### *G. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (section 202(a) (Pub. L. 104-4)), requires the Departments to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1

year.” In 2018, that threshold is approximately \$150 million. For purposes of the Unfunded Mandates Reform Act, the Moral IFC and these final rules do not include any federal mandate that may result in expenditures by state, local, or tribal governments, nor do they include any federal mandates that may impose an annual burden of \$150 million or more on the private sector.

#### *H. Federalism*

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have “substantial direct effects” on states, the relationship between the federal government and states, or the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the regulation.

These rules do not have any Federalism implications, since they only provide exemptions from the contraceptive and sterilization coverage requirement in HRSA Guidelines supplied under section 2713 of the PHS Act.

#### **IV. Statutory Authority**

The Department of the Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are adopted pursuant to the authority contained in 29 U.S.C. 1002(16), 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104-191, 110 Stat. 1936; sec. 401(b), Public Law 105-200, 112 Stat.

<sup>207</sup>Other noteworthy potential impacts encompass potential changes in medical expenditures, including potential decreased expenditures on contraceptive devices and drugs and potential increased expenditures on pregnancy-related medical services. OMB's guidance on EO 13771 implementation (<https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation>) states that impacts should be categorized as consistently as possible within Departments. The Food and Drug Administration, within HHS, and the Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA), within DOL, regularly estimate medical expenditure impacts in the analyses that accompany their regulations, with the results being categorized as benefits (positive benefits if expenditures are reduced, negative benefits if expenditures are raised). Following the FDA, OSHA and MSHA accounting convention leads to these final rules' medical expenditure impacts being categorized as (positive or negative) benefits, rather than as costs, thus placing them outside of consideration for EO 13771 designation purposes.

645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

The Department of Health and Human Services regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended; and Title I of the Affordable Care Act, sections 1301–1304, 1311–1312, 1321–1322, 1324, 1334, 1342–1343, 1401–1402, and 1412, Pub. L. 111–148, 124 Stat. 119 (42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701).

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Kirsten Wielobob,  
*Deputy Commissioner for Services and Enforcement.*  
Approved: October 30, 2018

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David J. Kautter,  
*Assistant Secretary for Tax Policy.*

(Filed by the Office of the Federal Register on November 7, 2018, 4:15 p.m., and published in the issue of the Federal Register for November 15, 2018, 83 F.R. 57592)

Signed this 29<sup>th</sup> day of October, 2018.

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Preston Rutledge,  
*Assistant Secretary*  
*Employee Benefits Security Administration*  
*Department of Labor*  
**Dated:** *October 17, 2018*

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Seema Verma,  
*Administrator,*  
*Centers for Medicare & Medicaid Services.*  
**Dated:** *October 18, 2018*

Alex M. Azar II,  
*Secretary,*

*Department of Health and Human Services.*

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

For the reasons set forth in this preamble, 26 CFR part 54 is amended as follows:

#### PART 54—PENSION EXCISE TAXES

1. The authority citation for part 54 continues to read, in part, as follows:

**Authority:** 26 U.S.C. 7805. \* \* \*

#### § 54.9815–2713 [Amended]

2. Section 54.9815–2713, as amended elsewhere in this issue of the **Bulletin**, is further amended in paragraph (a)(1)(iv) by removing the reference “147.131 and 147.132” and adding in its place the reference “147.131, 147.132, and 147.133”.

#### § 54.9815–2713A [Amended]

3. Section 54.9815–2713A, as amended elsewhere in this issue of the **Bulletin**, is further amended—

a. In paragraph (a)(1) by removing “or (ii)” and adding in its place “or (ii), or 45 CFR 147.133(a)(1)(i) or (ii)”;

b. In paragraph (a)(2) by removing the reference “147.132(a)” and adding in its place the reference “147.132(a) or 147.133(a)”;

c. In paragraph (b)(1)(ii) introductory text by removing the reference “147.132” and adding in its place the reference “147.132 or 147.133”;

d. In paragraph (b)(1)(ii)(B) by removing the reference “147.132” and adding in its place the reference “147.132 or 147.133”;

e. In paragraph (c)(1)(ii) introductory text by removing the reference “147.132” and adding in its place the reference “147.132 or 147.133”;

f. In paragraph (c)(1)(ii)(B) by removing the reference “147.132” and adding in its place the reference “147.132 or 147.133”; and

g. In paragraph (c)(2) by removing the reference “147.132” and adding in its place the reference “147.132 or 147.133”.

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

For the reasons set forth in the preamble, the Department of Labor adopts, as final, the interim final rules amending 29 CFR part 2590, published October 13, 2017 (82 FR 47838), without change.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

For the reasons set forth in the preamble, the Department of Health and Human Services adopts as final the interim final rules amending 45 CFR part 147 published on October 13, 2017 (82 FR 47838) with the following changes:

#### PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

4. The authority citation for part 147, as revised elsewhere in this issue of the **Bulletin**, continues to read as follows:

**Authority:** 42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92, as amended.

5. Section 147.133 is amended by revising paragraph (a)(1) introductory text, (a)(1)(ii), (a)(2), and (b) to read as follow:

#### § 147.133 Moral exemptions in connection with coverage of certain preventive health services.

(a) \* \* \*

(1) Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections specified below. Thus the Health Resources and Service Administration will exempt from any guidelines’ requirements that relate to the provision of contraceptive services:

\* \* \* \* \*

(ii) An institution of higher education as defined in 20 U.S.C. 1002, which is non-governmental, in its arrangement of student health insurance coverage, to the extent that institution objects as specified in paragraph (a)(2) of this section. In the case of student health insurance coverage, this section is applicable in a manner comparable to its applicability to group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer, and references to “plan participants and beneficiaries” will be interpreted as references to student enrollees and their covered dependents; and

\* \* \* \* \*

(2) The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects, based on its sincerely held moral convictions, to its establishing, maintaining, providing, offering, or arranging for (as applicable):

(i) Coverage or payments for some or all contraceptive services; or

(ii) A plan, issuer, or third party administrator that provides or arranges such coverage or payments.

(b) *Objecting individuals.* Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to individuals who object as specified in this paragraph (b), and nothing in § 147.130(a)(1)(iv), 26 CFR 54.9815–2713(a)(1)(iv), or 29 CFR 2590.715–2713(a)(1)(iv) may be construed to prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions. Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of in-

surance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

\* \* \* \* \*

## T.D. 9843

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

#### Allocation of Costs Under the Simplified Methods

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations on allocating costs to certain property produced or acquired for resale by a taxpayer. These final regulations: provide rules for the treatment of negative adjustments related to certain costs required to be capitalized to property produced or acquired for resale; provide a new simplified method of accounting for determining the additional costs allocable to property produced or acquired for resale; and redefine how certain types of costs are categorized for purposes of the simplified methods. These final regulations affect taxpayers that are producers or resellers of property that are required to capitalize costs to the property and that elect to allocate costs using a simplified method.

DATES: *Effective Date:* These regulations are effective on November 20, 2018. *Applicability Date:* For date of applicability, see §§ 1.263A–1(l)(5) and 1.263A–2(g)(3).

FOR FURTHER INFORMATION CONTACT: Natasha M. Mulleneaux, of the Office of the Associate Chief Counsel (Income Tax and Accounting) at (202) 317-7007 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains final regulations that amend the Income Tax Regulations (26 CFR part 1) relating to allocation of costs to certain property produced or acquired for resale under section 263A of the Internal Revenue Code (Code).

Section 263A requires taxpayers to capitalize the direct costs and indirect costs that are properly allocable to: (1) Real or tangible personal property produced by the taxpayer, and (2) real and personal property described in section 1221(a)(1) acquired for resale by the taxpayer. The costs that a taxpayer must capitalize under section 263A are its section 471 costs, additional section 263A costs, and interest capitalizable under section 263A(f). Section 263A generally requires taxpayers to allocate capitalizable section 263A costs to specific items of property produced or acquired for resale. However, section 263A(j) instructs the Secretary to prescribe regulations that may be necessary or appropriate to carry out the purposes of section 263A, including regulations providing simplified procedures. Accordingly, § 1.263A–1(f)(1) allows taxpayers to use the simplified methods provided in § 1.263A–2(b) (the simplified production method (SPM)) or § 1.263A–3(d) (the simplified resale method (SRM)) to allocate a lump sum of additional section 263A costs properly allocable to property produced or acquired for resale to property that is on hand at the end of the taxable year, in lieu of allocating costs to specific items of property. Some taxpayers using the SPM or SRM include a negative adjustment in additional section 263A costs when the taxpayer capitalizes a cost as a section 471 cost in an amount that is greater than the amount required to be capitalized for tax purposes. Notice 2007–29 (2007–14 IRB 881) provides that, pending the issuance of additional published guidance, the IRS generally will not challenge the inclusion of negative adjustments in computing additional costs under section 263A or the permissibility of aggregate negative additional section 263A costs.

On September 5, 2012, the Treasury Department and the IRS published in the **Federal Register** (77 FR 54482) a notice



of proposed rulemaking (REG-126770-06, 2012-38 IRB 347) under section 263A (the proposed regulations) relating to the inclusion of negative adjustments in additional section 263A costs under the simplified methods. The proposed regulations also provided a new simplified method of accounting, the modified simplified production method (MSPM), for determining the additional section 263A costs allocable to property produced or acquired for resale, and redefined how certain types of costs are categorized for purposes of the simplified methods. Two comments responding to the proposed regulations were received and a public hearing was held on January 7, 2013. After consideration of the comments received, these final regulations adopt the proposed regulations as revised by this Treasury decision.

## Summary of Comments and Explanation of Provisions

### 1. General Prohibition on Negative Adjustments in Additional Section 263A Costs

The proposed regulations generally provided that taxpayers could not include negative adjustments in additional section 263A costs to remove section 471 costs, unless the taxpayers used: (1) the SPM and had average annual gross receipts of \$10,000,000 or less; (2) the SRM; or (3) the MSPM.

Both commenters stated that the proposed regulations' prohibition on including negative adjustments in additional section 263A costs for taxpayers using the SPM (and above the gross receipts threshold) was unfair to taxpayers unable or unwilling to use the MSPM. One commenter suggested that taxpayers using the SPM are at a disadvantage compared to taxpayers using the MSPM, because the SPM overcapitalizes additional section 263A costs to the raw material content of ending inventory. Another commenter stated that the proposed regulations' prohibition on including negative adjustments in additional section 263A costs under the SPM unduly punished taxpayers that were unable to use the MSPM by requiring those taxpayers to calculate the amount of deductible section 471 costs that should be excluded from ending inventory. This commenter also suggested

that only a small number of taxpayers have the resources to determine these costs.

The Treasury Department and the IRS do not adopt these comments because including negative adjustments in additional section 263A costs under the SPM may result in significant distortions of the amount of additional section 263A costs and section 471 costs allocated to ending inventory. However, these final regulations include several changes to address these comments and reduce compliance costs, burden, and administrative complexity. Generally, including negative adjustments in additional section 263A costs results in distortions because the method used to capitalize the section 471 cost is different than the method used to remove the cost from ending inventory. The extent of the distortion, and whether it is favorable or unfavorable to the taxpayer, generally depends on whether the cost was incurred in the production process and how the cost was allocated to raw materials, work-in-process, or finished goods inventories for purposes of section 471. Accordingly, the general restriction on the inclusion of negative adjustments in additional section 263A costs provided in the proposed regulations remains unchanged in these final regulations.

In order to limit potential distortion in the simplified methods, these final regulations also provide a new consistency requirement for taxpayers that are permitted to include negative adjustments in additional section 263A costs to remove section 471 costs and that include negative adjustments to remove section 471 costs. The rule provides that such taxpayer must use this method of accounting for all section 471 costs that are permitted to be removed using negative adjustments.

In addition, these final regulations clarify that certain business expenses described in section 162(c), (e), (f), and (g), including bribes, lobbying expenses, and fines and penalties, cannot be removed from a taxpayer's section 471 costs as negative adjustments in additional section 263A costs. This clarification is consistent with § 1.471-3(f), which provides that certain of these expenses are not permitted to be included in the cost of inventories.

### 2. Classification of Costs

One commenter stated that it was unclear how negative adjustments in additional section 263A costs are measured (for example, in the case of depreciation, at the individual asset level or using total depreciation expense). These final regulations provide that section 471 costs, additional section 263A costs, and any adjustments to section 471 costs or additional section 263A costs are classified using the narrower of (1) the classifications of costs used by the taxpayer in its financial statement or (2) the classifications of costs in § 1.263A-1(e)(2), (3), and (4). If a cost is not described within § 1.263A-1(e)(2), (3), or (4), the cost is classified using the classification of costs used in the taxpayer's financial statement.

### 3. Modified Simplified Production Method

The proposed regulations provided a new simplified method, the MSPM, to reduce distortions that may result from the SPM. The MSPM in the proposed regulations reduced distortions by more precisely allocating additional section 263A costs, including negative adjustments, among raw materials, work-in-process, and finished goods inventories on hand at year end. Generally, taxpayers would have determined the allocable portion of pre-production additional section 263A costs using a pre-production absorption ratio of pre-production additional section 263A costs incurred during the taxable year over raw materials costs incurred during the taxable year. This ratio would have applied to raw material section 471 costs incurred during the taxable year and remaining on hand at year end (including unprocessed raw materials, and raw materials integrated into work-in-process and finished goods). Similarly, under the MSPM in the proposed regulations, taxpayers would have determined the allocable portion of all other additional section 263A costs using a production absorption ratio of production additional section 263A costs incurred during the taxable year over production section 471 costs incurred during the taxable year. This ratio would have applied to production section 471 costs incurred during the taxable

year and remaining on hand at year end (excluding raw materials integrated into work-in-process and finished goods).

Both commenters stated that some taxpayers could not readily identify raw materials that are integrated into work-in-process and finished goods inventories on hand at year end. The commenters asserted that those taxpayers would have to modify their books and records or purchase a new computer system to track these raw materials. Both commenters stated that this requirement would place an unfair burden on taxpayers, especially smaller taxpayers. One commenter suggested that the final regulations clarify that a taxpayer may use any reasonable method to estimate the raw material component of work-in-process and finished goods inventories on hand at year end.

First, to reduce the number of defined terms and to be consistent with the use of that term in § 1.263A-1(e)(2)(i)(A), these final regulations use the term “direct material costs” rather than “raw material costs,” as used in the proposed regulations.

Second, the Treasury Department and the IRS understand that some taxpayers may not be able to readily identify direct material costs in work-in-process and finished goods inventories on hand at year end. Accordingly, these final regulations modify the MSPM so that taxpayers using the MSPM are not required to separately track direct material costs that are integrated into work-in-process and finished goods inventories. Specifically, these final regulations modify the MSPM by: (1) Applying the pre-production absorption ratio to only unprocessed direct material section 471 costs incurred during the taxable year and remaining on hand at year end; (2) applying the production absorption ratio to all production section 471 costs incurred during the taxable year and remaining on hand at year end, which includes direct material costs that have entered or completed production; (3) including the pre-production additional section 263A costs that are not allocated by the pre-production absorption ratio in the numerator of the production absorption ratio; and (4) including the direct material costs that have entered or completed production in the denominator of the production absorption ratio. These modifications to

the proposed MSPM reduce compliance costs, burden, and administrative complexity by eliminating the need to separately track direct material costs in work-in-process and finished goods inventories on hand at year end.

One commenter stated that the production absorption ratio under the MSPM in the proposed regulations was distortive because it included post-production additional section 263A costs (for example, storage and handling allocable to finished goods). This commenter suggested the MSPM include a third ratio to allocate post-production additional section 263A costs to finished goods inventories. This suggestion is not adopted in the final regulations because including a third ratio to allocate post-production additional 263A costs adds a degree of complexity to the MSPM that outweighs the benefit of the additional precision it might provide.

#### *4. Allocation of Mixed Service Costs Under the MSPM*

The proposed regulations provided that taxpayers must allocate capitalizable mixed service costs to pre-production additional section 263A costs in proportion to the raw material costs in total section 471 costs, with the remaining amount of capitalizable mixed service costs allocated to production additional section 263A costs. The proposed regulations also specifically requested comments on how mixed service costs should be allocated between raw materials, work-in-process, and finished goods under the MSPM.

Both commenters stated that generally raw materials do not attract a large amount of mixed service costs, except for a limited amount of labor-related purchasing costs. The commenters stated that the proposed regulations’ allocation of capitalizable mixed service costs between pre-production and production additional section 263A costs resulted in a disproportionate allocation of mixed service costs to pre-production additional section 263A costs. One commenter suggested that the final regulations allow taxpayers to allocate capitalizable mixed service costs between pre-production and production additional section 263A costs using any reasonable method and provided an

example of a labor-based allocation method to allocate mixed service costs.

In response to the comments, these final regulations expand the types of methods permitted under the MSPM to allocate mixed service costs between pre-production and production additional section 263A costs. These regulations provide that a taxpayer using the MSPM that capitalizes mixed service costs using the simplified service cost method under § 1.263A-1(h) may allocate capitalizable mixed service costs to pre-production additional section 263A costs based on unprocessed direct material costs in section 471 costs or, alternatively, based on pre-production labor costs in total labor costs. Additionally, if a taxpayer using the MSPM determines its capitalizable mixed service costs using a method described in § 1.263A-1(g)(4) (a direct reallocation method, a step-allocation method, or any other reasonable allocation method), the taxpayer must use a reasonable method to allocate the costs (for example, department or activity costs) between pre-production and production additional section 263A costs, unless the taxpayer’s departments or activities are identified as exclusively pre-production or production. For example, it may be reasonable for a taxpayer using a method described in § 1.263A-1(g)(4) to allocate a department’s mixed service costs between pre-production and production additional section 263A costs based on labor associated with the department when the department is not exclusively identified as pre-production or production. If a taxpayer that determines its capitalizable mixed service costs using a method described in § 1.263A-1(g)(4) has departments or activities that are identified as exclusively pre-production or production, the department or activity costs must be allocated to pre-production or production additional section 263A costs according to the department’s or activity’s identification.

One commenter stated that the proposed regulations would unnecessarily require taxpayers that do not have any additional section 263A costs that relate to raw material costs to compute a pre-production absorption ratio. The commenter suggested allocating capitalizable mixed

service costs between pre-production and production additional section 263A costs based on the relative proportion of additional section 263A costs in each category that are incurred by the taxpayer. These final regulations do not adopt this suggestion because the relative amount of pre-production and production additional section 263A costs reflect the amount of capitalizable tax costs in excess of the costs capitalized for financial statement purposes but do not accurately reflect the amount of mixed service costs allocable to pre-production and production activities. However, in response to this comment and to reduce compliance costs and burden, these final regulations include a de minimis rule that allows taxpayers using the MSPM to allocate 100 percent of capitalizable mixed service costs to pre-production or production additional section 263A costs if 90 percent or more of the mixed service costs would otherwise be allocated to that amount.

#### *5. Property Produced for the Taxpayer Under a Contract and Property Acquired for Resale*

The proposed regulations did not provide explicit rules for the treatment of costs related to property produced for the taxpayer under a contract with another party that is treated as property produced by the taxpayer, as described in § 1.263A-2(a)(1)(ii)(B) (property produced under a contract), and property acquired for resale under the MSPM.

One commenter suggested that all costs related to property produced under a contract and property acquired for resale should be included in the pre-production absorption ratio under the MSPM. The Treasury Department and the IRS agree that generally costs related to property produced under a contract and property acquired for resale are best treated as pre-production costs because costs related to such property are primarily purchasing, storage, and handling costs, which are the costs frequently attributable to property that has not entered production. Accordingly, these final regulations adopt this suggestion and provide that additional section 263A costs properly allocable to property produced under a contract and property acquired for resale are generally included in pre-production additional sec-

tion 263A costs under the MSPM. Similarly, section 471 costs for property produced under a contract and property acquired for resale are generally included in pre-production section 471 costs under the MSPM.

One commenter also suggested that the final regulations clarify the treatment of costs related to property produced under a contract when the property is used in an additional production activity of the taxpayer. These final regulations adopt this suggestion and clarify that for purposes of the MSPM, direct material costs include property produced under a contract that are direct material costs for the taxpayer to be used in an additional production process of the taxpayer. These costs are included in pre-production section 471 costs.

#### *6. Last-In, First-Out (LIFO) Method Taxpayers Using the MSPM*

The proposed regulations provided that LIFO method taxpayers using the MSPM must multiply an inventory increment by a combined absorption ratio to determine the amount of additional section 263A costs that must be added to the taxpayers' increment for the year. The proposed regulations defined the numerator of the combined absorption ratio as total additional section 263A costs allocable to eligible property remaining on hand at year end and the denominator as the total section 471 costs remaining on hand at year end. The proposed regulations also specifically requested comments on how the MSPM should apply to taxpayers using the LIFO method.

One commenter suggested that LIFO-method taxpayers should be allowed to use the same two absorption ratios as taxpayers using the first-in, first-out (FIFO) method of accounting for inventories, rather than a combined absorption ratio, to determine the amount of additional section 263A costs that must be added to the inventory increment for the year. This suggestion is not adopted because it would require LIFO-method taxpayers to divide their inventory increments and decrements into raw material and production components, which would add unnecessary complexity and administrability chal-

lenges to the LIFO method and the MSPM.

One commenter suggested that LIFO-method taxpayers should be allowed to choose between annual absorption ratios and shorter-term ratios, and base the shorter-term ratios on the taxpayer's method of determining the current-year cost of the items in ending inventory and the value of any inventory increments. This suggestion is not adopted because it ignores the fact that indirect costs are frequently incurred outside of the period used for determining current-year cost, and use of a shorter-term ratio could cause distortions.

One commenter suggested that the final regulations provide special rules for taxpayers that have elected to apply the LIFO method only to raw materials, including raw materials that have entered or completed the production process (the raw material content LIFO method). Specifically, the commenter suggested that final regulations provide that the combined absorption ratio should be applied to any LIFO increment of a taxpayer using the raw material content LIFO method with the pre-production and production absorption ratios applied separately to non-LIFO inventory. The Treasury Department and the IRS agree that the combined, pre-production, and production absorption ratios could all apply in the case of a taxpayer using the raw material content LIFO method and believe this point is sufficiently clear in these final regulations.

One commenter stated that the definition of the combined absorption ratio was ambiguous because it did not indicate whether the combined absorption ratio was determined on a LIFO basis. The Treasury Department and the IRS intended that the combined absorption ratio be determined on a non-LIFO basis; accordingly, this point is clarified in these final regulations.

#### *7. Definition of Section 471 Costs*

The proposed regulations provided one definition of section 471 costs that applied to taxpayers using the SRM, SPM, or MSPM, regardless of whether those taxpayers were in existence before the effective date of section 263A. The proposed regulations generally provided that a tax-



payer's section 471 costs were the costs, other than interest, that the taxpayer capitalized to its inventory or other eligible property in its financial statements. The proposed regulations also provided, consistent with the IRS's established administrative practice, that taxpayers must include all direct costs in section 471 costs regardless of the treatment of the costs in their financial statements.

These final regulations clarify that a taxpayer's section 471 costs are the types of costs capitalized to property produced or property acquired for resale in the taxpayer's financial statement. These final regulations also clarify that a taxpayer determines the amounts of its section 471 costs by using the amounts of those costs that are incurred in the taxable year for federal income tax purposes. These final regulations also generally retain the proposed regulations' requirement that section 471 costs must include all direct costs of property produced and property acquired for resale.

However, the Treasury Department and the IRS understand that maintaining separate financial statement and federal income tax cost accounting systems or adjusting the amounts of costs capitalized using the taxpayer's financial statement methods for federal income tax purposes can be costly and burdensome. Therefore, these final regulations provide an alternative method that certain taxpayers may use to determine the amounts of their section 471 costs. This alternative method is available to a taxpayer that is permitted to include negative adjustments in additional section 263A costs to remove section 471 costs if that taxpayer's financial statement is described in § 1.263A-1(d)(6)(i), (ii), or (iii) (for example, a financial statement required to be filed with the Securities and Exchange Commission (SEC); a certified audited financial statement used for a substantial non-tax purpose; or a financial statement (other than a tax return) required to be provided to the government). This method is not available to a taxpayer if the taxpayer's financial statement is described only in § 1.263A-1(d)(6)(iv) (for example, an unaudited financial statement used for a substantial non-tax purpose). The use of this alternative method is limited to taxpayers that have certain financial statements in order to provide ade-

quate safeguards for the use of financial statement amounts in the simplified method formulas. A taxpayer that uses the alternative method determines the amounts of all of its section 471 costs by using the amounts of costs capitalized to property produced or property acquired for resale in the taxpayer's financial statement using the taxpayer's financial statement methods of accounting. A taxpayer using the alternative method may not include any financial statement write-downs, reserves, or other financial statement valuation adjustments when determining the amounts of its section 471 costs.

In order to limit potential distortions in the simplified methods' absorption ratios, these final regulations require a taxpayer that uses the alternative method to consistently apply the method to all of its section 471 costs, including any direct costs required to be included in section 471 costs, any costs used for purposes of applying the de minimis direct costs rules, any costs included in additional section 263A costs after applying the de minimis direct costs rules and the safe harbor rule for certain variances and under or over-applied burdens, and any costs removed from section 471 costs because such costs are not required to be, or are not permitted to be, capitalized under section 263A. In addition, a taxpayer using the alternative method includes in additional section 263A costs all negative adjustments to remove section 471 costs and all permitted positive and negative book-to-tax adjustments. A taxpayer using the alternative method, and the burden rate or standard cost methods described in § 1.263A-1(f)(3), determines the book-to-tax adjustments required to be made as a result of differences in financial statement and tax amounts by comparing the actual amount of the cost incurred in the taxable year for federal income tax purposes to the actual amount of the cost incurred in the taxable year in its financial statement using the taxpayer's financial statement methods of accounting, regardless of how the taxpayer treats its variances or under or over-applied burdens.

One commenter noted that the proposed regulations do not specify how taxpayers must account for differences between their financial statement methods and the tax methods used to determine the

value of ending inventory. These differences include special tax methods, such as the lower of cost or market method and the retail inventory method, as well as special financial statement methods, such as write-downs or reserves for slow-moving goods. The final regulations do not change the current requirement that a taxpayer must value its ending inventory by applying its tax methods of accounting, and provide that a taxpayer using the alternative method to determine the amounts of its section 471 costs may not include any financial statement write-downs, reserves, or other financial statement valuation adjustments when determining the amounts of its section 471 costs.

#### *8. Financial Statement Hierarchy and Record Keeping Requirements for Financial Statements*

The proposed regulations did not provide any guidance as to which financial statement a taxpayer uses to determine its section 471 costs. For clarity and consistency, these final regulations provide that for purposes of section 263A, a taxpayer's financial statement is its financial statement of the highest priority, in accordance with the list of categories of financial statements, in order of priority, provided in these final regulations. For example, in order to determine its types of section 471 costs, a taxpayer uses the types of costs capitalized in its financial statement with the highest priority within the categories described in these final regulations.

These final regulations do not impose any specific record keeping requirements for a taxpayer's identification of costs as section 471 or additional section 263A costs, or for a taxpayer's determination of the amounts of section 471 costs. However, the regulations under section 6001 require a taxpayer to keep books and records sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown in an income tax return, which includes the identification of costs as section 471 or additional section 263A costs and the determination of the amounts of section 471 costs. This requirement also includes any books and records sufficient to establish a taxpayer's calculation of variances and under or

over-applied burdens used for financial statement purposes.

## 9. *De Minimis Exceptions for Certain Direct Costs in Section 471 Costs*

### a. *Direct Labor Costs*

As noted previously, the proposed regulations provided, consistent with the IRS's established administrative practice, that taxpayers must include all direct costs in section 471 costs regardless of the treatment of the costs in their financial statement. Both commenters stated that some taxpayers do not capitalize certain direct labor costs (for example, holiday pay, sick leave pay, shift differential, and payroll taxes) to inventory for financial statement purposes, and that the proposed regulations' requirement to include all direct costs in section 471 costs would force these taxpayers to create or purchase and maintain a second inventory costing system for tax purposes only.

These final regulations generally retain the proposed regulations' requirement that section 471 costs must include all direct costs of property produced and property acquired for resale. However, to reduce compliance costs, burden, and administrative complexity, these final regulations provide a *de minimis* direct labor costs rule to allow taxpayers using the SRM, SPM, or MSPM to include in additional section 263A costs, and exclude from section 471 costs, certain direct labor costs that are not capitalized to property produced or property acquired for resale in the taxpayer's financial statement (uncapitalized direct labor costs). However, a taxpayer cannot use this *de minimis* direct labor costs rule to include in additional section 263A costs basic compensation or overtime or the types of costs included in the taxpayer's standard cost or burden rate methods used for section 471 costs.

Under this *de minimis* direct labor costs rule, a taxpayer includes in additional section 263A costs, and excludes from section 471 costs, the total amount of all direct labor costs that are incurred in the taxable year that are uncapitalized direct labor costs, if the total amount of those costs is less than five percent of total direct labor costs incurred in the taxable year (whether or not capitalized for finan-

cial statement purposes). The *de minimis* direct labor costs rule requires that any amounts that constitute a reduction to costs be treated as positive amounts for purposes of determining whether the taxpayer's uncapitalized direct labor costs meet the five percent test. For a taxpayer using the alternative method to determine the amounts of its section 471 costs, the five percent test and the amount included in additional section 263A costs are based on the amount of uncapitalized direct labor costs and total direct labor costs that are incurred in the taxable year in the taxpayer's financial statement using the taxpayer's financial statement methods of accounting. The alternative-method taxpayer includes in additional section 263A costs any negative or positive adjustment required to be made as a result of differences in financial statement and tax amounts of the taxpayer's *de minimis* direct labor costs.

A taxpayer using a historic absorption ratio (HAR) that uses the *de minimis* direct labor costs rule during its test period or updated test period could treat a particular direct labor cost as an additional section 263A cost in one year of the test period or updated test period, and as a section 471 cost in a different year of the test period or updated test period. The *de minimis* direct labor costs rule provides a special rule that requires this taxpayer to use the SRM, SPM, or MSPM and HAR during the qualifying period or extended qualifying period in a manner that is most consistent with the treatment of the direct labor costs during the test period or updated test period. Under this rule, the taxpayer determines whether direct labor costs are included in any of its section 471 costs remaining on hand at year end during its qualifying period or extended qualifying period consistent with how those direct labor costs were classified in at least two of the three years of the taxpayer's applicable test period or updated test period.

### b. *Direct Material Costs*

The preamble to the proposed regulations stated that the proposed regulations generally prohibited treating cash or trade discounts as negative adjustments in additional section 263A costs under any of the

simplified methods. The proposed regulations expressly prohibited treating cash or trade discounts as negative adjustments in additional section 263A costs under the MSPM and the SRM, inadvertently omitting taxpayers using the SPM from the prohibition. The operative rule in the proposed regulations also specifically requested comments on reasonable methods of allocating cash or trade discounts that taxpayers do not capitalize for financial statement purposes between ending inventory and cost of goods sold. In addition, the Treasury Department and the IRS are aware that some taxpayers do not capitalize for financial statement purposes certain direct material costs (for example, transportation and other necessary charges incurred to acquire possession of goods).

One commenter stated that the proposed regulations' treatment of cash and trade discounts would impose an administrative burden on taxpayers that do not treat any or all of their cash and trade discounts as negative purchase or production costs for financial statement purposes. The commenter suggested that, if the final regulations preclude a taxpayer from treating cash and trade discounts as negative additional section 263A costs, then taxpayers should be allowed to allocate cash and trade discounts between ending inventory and costs of goods sold using some type of averaging convention.

In general, cash and trade discounts related to section 471 costs, and transportation and other necessary charges incurred to acquire possession of goods, are treated as adjustments to the underlying section 471 costs, and cannot be included as a negative adjustment in additional section 263A costs. However, to reduce compliance costs, burden, and administrative complexity, these final regulations provide a *de minimis* direct material costs rule to allow taxpayers using the SRM, SPM, or MSPM to include in additional section 263A costs, and exclude from section 471 costs, certain direct material costs that are uncapitalized financial statement costs. This *de minimis* direct material costs rule can be used for certain direct material costs that are not capitalized to property produced or property acquired for resale in a taxpayer's financial statement (uncapitalized direct material costs) such as cash discounts, trade discounts,

and freight-in costs. However, a taxpayer cannot use this de minimis direct material costs rule to include in additional section 263A costs the types of costs that are included in the taxpayer's standard cost method used for section 471 costs (including cash and trade discounts).

Under this de minimis direct material costs rule, a taxpayer includes in additional section 263A costs, and excludes from section 471 costs, the total amount of all direct material costs incurred in the taxable year that are uncapitalized direct material costs, if the amount of those costs in total comprise less than five percent of total direct material costs incurred in the taxable year (whether or not capitalized for financial statement purposes). The de minimis direct material costs rule requires that any amounts that constitute a reduction to costs, such as cash and trade discounts, be treated as positive amounts for purposes of determining whether the taxpayer's uncapitalized direct material costs meet the five percent test. The de minimis direct material costs rule operates similarly to the de minimis direct labor costs rule for an alternative method taxpayer, and for a taxpayer using a HAR. Because any direct material costs included in additional section 263A costs after applying the de minimis direct material costs rule are excluded from section 471 costs, such direct material costs are not treated as section 471 costs for any purpose, including as section 471 costs that are direct material costs in the modified simplified production method formula.

#### 10. *Variances and Under- or Over-Applied burdens*

Both commenters stated that some taxpayers do not capitalize certain variances related to direct costs to inventory for financial statement purposes, and that the proposed regulations' requirement to include all direct costs in section 471 costs would force these taxpayers to create or purchase and maintain a second inventory costing system for tax purposes only. The IRS's established administrative practice requires taxpayers to treat positive and negative cost variances and under or over-applied burden amounts related to direct and indirect section 471 costs as adjustments to the underlying section 471 costs.

However, to reduce compliance costs, burden, and administrative complexity, these final regulations provide a safe harbor rule for taxpayers using the SRM, SPM, or MSPM to include in additional section 263A costs, and exclude from section 471 costs, certain variances and under or over-applied burdens that are not capitalized to property produced or property acquired for resale in the taxpayer's financial statement (uncapitalized variances or uncapitalized under or over-applied burdens).

Under this safe harbor rule, a taxpayer includes in additional section 263A costs, and excludes from section 471 costs, the sum of the amounts of all of those uncapitalized variances and uncapitalized under or over-applied burdens for that taxable year, if such sum is less than five percent of the taxpayer's total section 471 costs for all items for which the taxpayer uses a standard cost or burden rate method to allocate costs. For purposes of this rule, total section 471 costs for all items for which the taxpayer uses a standard cost or burden rate method to allocate costs are computed before application of the safe harbor method, and must reflect the actual amounts incurred by the taxpayer on these items, which therefore include variances and under or over-applied burdens. If the sum of the amounts of all of those uncapitalized variances and uncapitalized under or over-applied burdens in a taxable year are not less than five percent for the taxable year, the taxpayer must reallocate such uncapitalized amounts to or among units of property as required by § 1.263A-1(f)(3)(i)(C) or (f)(3)(ii)(B), respectively.

Under this safe harbor rule, all variances and under or over-applied burdens are treated as positive amounts for purposes of determining whether the taxpayer's uncapitalized variances and uncapitalized under or over-applied burdens meet this five percent test. Additionally, this safe harbor rule applies to any variances on cash or trade discounts that are included in the taxpayer's standard cost, if those discounts are capitalized as part of the taxpayer's standard cost method used for section 471 costs. An eligible taxpayer must consistently apply the safe harbor method to all items for which the taxpayer uses a standard cost or burden rate method to allocate costs. However, the safe harbor

rule only applies to a taxpayer's uncapitalized variances and uncapitalized under or over-applied burdens. In addition, a taxpayer using this safe harbor rule is not permitted to treat uncapitalized variances and uncapitalized under or over-applied burdens that are not significant as not allocable to property produced or property acquired for resale under § 1.263A-1(f)(3)(i)(C) and (f)(3)(ii)(B), respectively.

Finally, for taxpayers using either the SRM or MSPM, allocation rules are provided to help taxpayers allocate these uncapitalized costs between storage and handling costs and current year purchasing costs, in the case of the SRM, and pre-production and production costs, in the case of the MSPM.

#### 11. *Smaller Taxpayers Using the SPM*

The proposed regulations allowed taxpayers with average annual gross receipts of \$10,000,000 or less for the three previous taxable years to include negative adjustments in additional section 263A costs under the SPM.

One commenter stated that average annual gross receipts of \$10,000,000 or less does not accurately represent a "small taxpayer." The commenter suggested using the average aggregate value of ending inventory, rather than gross receipts, to identify this group of taxpayers. Both commenters also stated that small taxpayers would have difficulty complying with the MSPM.

The Treasury Department and the IRS do not believe that an average aggregated ending inventory value accurately identifies smaller taxpayers because inventory value can fluctuate greatly within the taxable year, or from year to year. Accordingly, this suggestion is not adopted. However, to reduce compliance costs and burden for smaller taxpayers using the SPM and minimize the difficulty that smaller taxpayers may face complying with the MSPM, these final regulations allow taxpayers with average annual gross receipts of \$50,000,000 or less for the three previous taxable years to include negative adjustments in additional section 263A costs under the SPM.



## 12. *Comments Regarding the HAR and the MSPM*

The proposed regulations provided that a taxpayer using the MSPM could make the HAR election. Under the proposed regulations, a non-LIFO-method taxpayer using the MSPM with the HAR election calculates both a pre-production HAR and a production HAR, to be used for each taxable year within a qualifying period (in place of the actual pre-production absorption ratio and actual production absorption ratio). In the first taxable year following the close of a qualifying period—the recomputation year—if the taxpayer’s actual pre-production absorption ratio or actual production absorption ratio is not within one-half of one percentage point (plus or minus) of the corresponding HAR, the taxpayer must use actual absorption ratios during an updated test period, and the qualifying period is not extended. A LIFO-method taxpayer using the MSPM with the HAR election, however, calculates a combined HAR to be used for each taxable year within a qualifying period (in place of the actual combined absorption ratio). In the recomputation year, if the LIFO-method taxpayer’s actual combined absorption ratio is not within one-half of one percentage point (plus or minus) of the combined HAR, the taxpayer must use an actual combined absorption ratio during an updated test period, and the qualifying period is not extended.

One commenter suggested that the rules for determining whether a qualifying period is extended for LIFO taxpayers should also apply to non-LIFO-method taxpayers, and therefore, in the recomputation year, all taxpayers should use a combined HAR to compare to an actual combined absorption ratio. This suggestion is not adopted because calculating combined absorption ratios does not match the ratios required to be calculated by a non-LIFO-method taxpayer using the MSPM. A non-LIFO-method taxpayer using the MSPM is required to calculate separate absorption ratios, even when using the HAR.

The proposed regulations also specifically requested comments on transition rules for taxpayers currently using the SPM with the HAR election that change

to the MSPM, including comments on how the regulations should apply to taxpayers within a qualifying period as described in § 1.263A-2(b)(4)(ii)(C). One commenter suggested allowing taxpayers currently using the HAR that are changing to the MSPM with the HAR election to open a new test period. Additionally, one commenter suggested that taxpayers be permitted to make the change using a section 481(a) adjustment instead of a cut-off method.

Except as otherwise expressly provided by the Code or the regulations thereunder, section 446(e) and § 1.446-1(e)(2) require a taxpayer to secure the consent of the Commissioner before changing a method of accounting for federal income tax purposes. Section 1.446-1(e)(3)(ii) authorizes the Commissioner to prescribe administrative procedures setting forth the terms and conditions necessary for a taxpayer to obtain consent to a change in method of accounting. Revenue Procedure 2015-13, 2015-5 IRB 419, as clarified and modified by Rev. Proc. 2015-33, 2015-24 IRB 1067, as modified by Rev. Proc. 2016-1, 2016-1 IRB 1, and as modified by Rev. Proc. 2017-59, 2017-48 IRB 543, provides the general procedures by which a taxpayer may obtain automatic consent of the Commissioner to a change in method of accounting described in Rev. Proc. 2018-31, 2018-22 IRB 637. The automatic consent procedures reduce filing requirements, waive user fees, and extend filing deadlines normally associated with a request for change in method of accounting.

Simultaneously with the publication of these final regulations, the Treasury Department and the IRS are issuing Revenue Procedure 2018-56 (2018-50 IRB) to modify Rev. Proc. 2018-31 and provide the procedures by which a taxpayer may obtain automatic consent to make certain method changes to conform to these final regulations, such as a change to the MSPM by a taxpayer using the HAR.

## 13. *Procedural Requirements for Changing Section 471 Costs or Changing to the MSPM*

The proposed regulations did not provide procedural rules for taxpayers changing to comply with the final regulations.

One commenter suggested that the automatic change procedures apply or that procedures be implemented allowing the change to be made on an expedited basis.

Simultaneously with the publication of these final regulations, the Treasury Department and the IRS are issuing Revenue Procedure 2018-56 to modify Rev. Proc. 2018-31 and provide the procedures by which a taxpayer may obtain automatic consent to make certain method changes to conform to these final regulations, such as a change to comply with the new definition of section 471 costs or a change to the MSPM.

### **Effective Date**

These final regulations are generally effective as of November 20, 2018 and apply for taxable years beginning on or after November 20, 2018. For any taxable year that both begins before November 20, 2018 and ends after November 20, 2018, the IRS will not challenge return positions consistent with all of these final regulations.

### **Special Analyses**

#### *Regulatory Planning and Review – Economic Analysis*

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, of harmonizing rules, and of promoting flexibility.

These final regulations have been designated by the Office of Information and Regulatory Affairs (OIRA) as Significant under Executive Order 12866 and section 1(b) of the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations and thereby subject to review under Executive Order 12866. Accordingly, these final regulations have been reviewed by OIRA.

## A. Overview

These final regulations provide taxpayers with computational and definitional guidance regarding the application of section 263A under the simplified methods. Specifically, they provide guidance for taxpayers to determine the amount of additional section 263A costs to capitalize and make several changes regarding the application of section 263A under the simplified methods to reduce compliance costs, burden, and administrative complexity. This economic analysis describes the economic benefits and costs of these final regulations.

## B. Economic Analysis of the Final Regulations

### 1. Background

For a discussion of the background of these final regulations, see the Background sections of this preamble and the proposed regulations.

### 2. Anticipated Benefits and Costs of the Final Regulations

#### a. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these final regulations against a status quo baseline that reflects projected tax-related and other behavior in the absence of these final regulations and includes the effect of Notice 2007–29. Notice 2007–29 allows taxpayers to include negative adjustments in computing additional costs under section 263A and allows aggregate negative additional section 263 costs.

#### b. Anticipated Benefits

The Treasury Department and the IRS expect that the certainty and clarity provided by these final regulations as well as the substantive contribution of the regulations will enhance economic efficiency relative to the baseline.

In developing these final regulations, the Treasury Department and the IRS have generally aimed to apply the principle that an economically efficient tax system would treat income derived from sim-

ilar economic decisions similarly, to the extent consistent with the Code and considerations of administrability of the tax system.

An economically efficient tax system would generally allow businesses to deduct from income taxes an amount meant to capture the economic cost of their capital investments. Under this principle, rules for capitalization and deductions are most efficient when they most closely mimic true economic depreciation. This conclusion is complicated by a large number of real world factors, including that economic depreciation is endogenous and difficult to measure and that the tax system itself will affect true depreciation. Furthermore, the principles from which the true-economic-depreciation prescription is derived are themselves based on a “pure” tax system rather than the complex real world tax code. The Treasury Department and the IRS do not anticipate substantial changes to the aggregate cost of goods sold, the aggregate tax bases of other produced assets, or the depreciation deductions that will be generated under the new simplified method, the MSPM, relative to the baseline. Therefore these final regulations should not materially affect aggregate tax revenues or aggregate inventory investment relative to the baseline. There may be some modest increase in investment in inventory. For example, investment in raw materials inventory may increase under these final regulations because the relative tax cost of buying and carrying raw materials under the MSPM is generally less than under the SPM. Treatment of inventory under the simplified methods generally remains the same. Because the tax system requires a periodic determination of inventory, there was and still is, an incentive to minimize inventory as of that date, usually the end of the taxable year. The increased investment in raw materials inventory under the MSPM is due to the fact that inventory as of the determination date may be divided into pre-production and production inventory and a specific rate is applied to estimate overhead for each category. While under the SPM the inventory as of the determination date is not divided and one rate is used to estimate overhead for all inventory. There may also be a modest shifting of investment between different types of

inventory because the MSPM should improve the measurement of certain types of final inventory and improved precision would generally lead to small adjustments in inventory amounts. Though no specific types of inventory are treated favorably, the modest shifting of investment is expected because the reduced carrying cost associated with maintaining raw materials inventory may encourage or allow some taxpayers to carry a larger quantity of raw materials for business purposes.

#### c. Anticipated Impacts on Administrative and Compliance Costs

The Treasury Department and the IRS expect that the certainty, clarity, and simplifying changes regarding the application of section 263A provided by these final regulations, relative to the baseline, will reduce annual compliance costs, burden, and administrative complexity. Absent these final regulations, different parties would continue to take different positions regarding the inclusion of negative adjustments in computing additional costs under section 263A and the permissibility of aggregate negative additional section 263A costs. More uniform positions by taxpayers will in general reduce the costs of tax administration.

For taxpayers, the major cost savings of these final regulations derive from the reduction in the computational and record-keeping burdens involved with the use of the simplified methods for calculating end-of-year inventory. These burdens are reduced because taxpayers will now generally be able to use their own current financial accounting methods to determine their section 471 costs, albeit using cost amounts determined under tax law. Taxpayers with audited financial statements, or those who file regulatory financial statements, will also be able to use cost amounts determined according to financial accounting rules. In addition, taxpayers using a simplified method will be able to make positive and negative adjustments to their additional section 263A costs in cases where their section 471 costs, determined using financial accounting methods, either do not capitalize all actual costs or over-capitalize those costs. Finally, taxpayers using the SRM or the MSPM, and smaller taxpayers (those with

average gross receipts of \$50 million or less) using the SPM will be able to make negative adjustments to their additional section 263A costs in cases where the capitalization of certain costs is either optional or not permitted under the tax law. It is anticipated that larger taxpayers using the SPM who desire such treatment will switch from using the SPM to the MSPM in order to continue to make these negative adjustments.

In addition, absent these final regulations, taxpayers and the IRS would: (1) Continue to be required to use definitions based on a taxpayer’s accounting practices used in 1986; (2) continue to be required to use tax accounting rules, rather than their own financial accounting rules, to determine the allocation of certain capitalized amounts; (3) not be able to use the MSPM to more precisely determine the lump-sum of costs to capitalize; (4) not be able to use the new safe-harbors for direct labor and direct material costs not capitalized on a taxpayer’s financial statements; and (5) not be able to use the *de minimis* rules for variances and under- or over-applied burden not capitalized on a taxpayer’s financial statements. The changes in each of these directions under the final regulations will generally reduce taxpayer compliance costs. For example, under these final regulations, one definition of section 471 costs applies to all taxpayers, regardless of when the taxpayer came into existence. Previously, taxpayers in existence when section 263A was enacted were required to use definitions based on

their actual tax cost accounting practices as of enactment. However, taxpayers that were not in existence when section 263A was enacted were required to use definitions based on what their tax cost accounting practices would have been as of enactment under the law at that time. Under these final regulations, all taxpayers use their present financial statement cost accounting practices. Moreover, taxpayers using the simplified resale method or simplified production method will benefit from no longer being required to adjust their section 471 costs incurred during the taxable year to reflect tax adjustments in their respective simplified method formula. Rather, these simplified method taxpayers may use an alternative method that permits them to use their financial statement amounts for their section 471 costs incurred during the taxable year and make tax adjustments to these costs by using negative adjustments to their section 263A costs.

The most recently available Statistics of Income (SOI) indicates that approximately 30,000 taxpayers were subject to section 263A in 2015 and would be impacted by these final regulations. While the number of affected taxpayers will increase with growth in the economy, the Treasury Department and the IRS do not expect that these final regulations will change the portion of affected taxpayers that use a simplified method because those taxpayers not using a simplified method will likely continue to allocate capitalizable costs to specific items of property

under their present method, and taxpayers using a simplified method are not likely to begin capitalizing costs to specific items of property due to these final regulations. The IRS’s Office of Research, Applied Analytics, and Statistics (RAAS) estimate that these 30,000 taxpayers spent approximately 315,000 hours and \$26 million (\$2015) annually to comply with the simplified methods, as implemented under Notice 2007–29. The dollar burden is derived from RAAS’s Business Taxpayer Burden model that relates time and out-of-pocket costs of business tax preparation, derived from survey data, to assets and receipts of affected taxpayers along with other relevant variables, and converted by the Treasury Department to \$2015. See Tax Compliance Burden (John Guyton et al, July 2018) at <https://www.irs.gov/pub/irs-soi/d13315.pdf>. The Treasury Department and IRS then used this framework to estimate the taxpayer burden associated with section 263A compliance under the final regulations. These estimates reflect the Treasury Department’s and IRS’s estimate that because these final regulations implement an approach substantially consistent with current practice, but also offer taxpayers additional compliance simplifications, these final regulations will result in a reduction in the aggregate annual taxpayer compliance burden of approximately ten percent. The estimated reduction in annual compliance burden for impacted taxpayers is summarized below.

	Estimated Reduction in Annual Compliance Burden (2015 levels)		
	Baseline	Final Regulations	Burden Reduction
Taxpayers	30,000	30,000	-
Hours	315,000	283,500	31,500
Cost (\$2015)	\$26,000,000	\$23,400,000	\$2,600,000

### C. Paperwork Reduction Act

The collection of information in these final regulations is in § 1.263A–2(c)(4)(i). The collection of information in § 1.263A–2(c)(4)(i) only applies to taxpayers using the MSPM with HAR. The burden for the collection of information contained in these final regulations is reflected in the burden for §§ 1.263A–2(b)(4)(iii)(A) and (B) and 1.263A–3(d)(4)(iii)(A) and (B) and is not

expected to change the previously determined estimated annual burden per respondent, the estimated annual burden per recordkeeper, or the estimated number of respondents because (i) taxpayers could previously use a simplified method with HAR, (ii) these final regulations do not make a simplified method with HAR more or less desirable, and (iii) only those taxpayers previously using a simplified method with HAR are likely to do so under these final

regulations. For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the reporting burden associated with § 1.263A–2(c)(4)(i) will be reflected in the IRS Form 14029, Paperwork Reduction Act Submission, associated with Form 1120 (OMB control number 1545-0123) at [www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201706-1545-005](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201706-1545-005).



D. Executive Order 13771

These final regulations are expected to be an Executive Order 13771 deregulatory action. Details on the estimated effects of this rule can be found in the rule’s economic analysis.

E. Regulatory Flexibility Analysis

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that: (1) many small business taxpayers are no longer required to capitalize costs under section 263A if their average annual gross receipts are less than \$25,000,000; (2) a taxpayer with average annual gross receipts of less than \$50,000,000 may continue to use the simplified production method and the simplified production method with a historical absorption rate (HAR) with negative amounts in additional section 263A costs; and (3) a relatively small number of taxpayers use a simplified method with HAR compared to a simplified method without HAR and, therefore, it is expected that few small business taxpayers will use the modified simplified production method with HAR. Thus, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

F. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately \$150 million. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

G. Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Drafting Information

The principal author of these final regulations is Natasha M. Mulleneaux of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART I—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the sectional authority entries for §§ 1.263A-1, 1.263A-2, 1.263A-3 and 1.263A-7, and adding a sectional authority for § 1.471-3 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

\*\*\*\*\*

Section 1.263A-1 also issued under 26 U.S.C. 263A(j).

Section 1.263A-2 also issued under 26 U.S.C. 263A(j).

Section 1.263A-3 also issued under 26 U.S.C. 263A(j).

\*\*\*\*\*

Section 1.263A-7 also issued under 26 U.S.C. 263A(j).

\*\*\*\*\*

Section 1.471-3 issued under 26 U.S.C. 471(a).

\*\*\*\*\*

Par. 2. Section 1.263A-0 is amended by:

1. Revising the entry for § 1.263A-1(d)(2)(ii).

2. Adding entries for § 1.263A-1(d)(2)(ii)(A) and (B).

3. Revising the entry for § 1.263A-1(d)(2)(iii).

4. Adding entries for § 1.263A-1(d)(2)(iii)(A) through (E), (d)(2)(iv), (d)(2)(iv)(A) through (E), (d)(2)(v), (d)(2)(v)(A) through (E), and (d)(2)(vi) and (vii).

5. Adding entries for § 1.263A-1(d)(3)(i), (d)(3)(ii), and (d)(3)(ii)(A) through (E).

6. Adding entries for § 1.263A-1(d)(5) and (6).

7. Adding entries for § 1.263A-2(b)(4)(v)(A) and (B).

8. Revising the entry for § 1.263A-2(c).

9. Adding entries for § 1.263A-2(c)(1), (c)(2), (c)(2)(i) and (ii), (c)(3), (c)(3)(i), (c)(3)(i)(A) and (B), (c)(3)(ii), (c)(3)(ii)(A) and (B), (c)(3)(ii)(B)(I) and (2), (c)(3)(ii)(C) and (D), (c)(3)(ii)(D)(I) through (4), (c)(3)(ii)(E) and (F), (c)(3)(iii), (c)(3)(iii)(A) through (C), (c)(3)(iv), (c)(3)(iv)(A) and (B), (c)(3)(iv)(B)(I) and (2), (c)(3)(iv)(C), (c)(3)(v) and (vi), (c)(4), (c)(4)(i) and (ii), (c)(4)(ii)(A) and (B), (c)(4)(iii), (c)(4)(iii)(A) and (B), (c)(4)(iii)(B)(I) and (2), and (c)(4)(iv) and (v).

10. Revising the entry for § 1.263A-2(d).

11. Revising the entry for § 1.263A-2(e).

12. Removing the entries for § 1.263A-2(e)(1) through (5).

13. Revising the entry for § 1.263A-2(f).

14. Adding entries for § 1.263A-2(f)(1) through (5).

15. Adding an entry for § 1.263A-2(g).

16. Adding entries for § 1.263A-3(d)(4)(v)(A) and (B).

The revisions and additions read as follows:

§ 1.263A-0 Outline of regulations under section 263A.

\*\*\*\*\*

§ 1.263A-1 Uniform Capitalization of Costs.

\* \* \* \* \*

- (d) \* \* \*
- (2) \* \* \*
- (ii) Inclusion of direct costs.
  - (A) In general.
  - (B) Allocation of direct costs.
- (iii) Alternative method to determine amounts of section 471 costs by using taxpayer's financial statement.
  - (A) In general.
  - (B) Book-to-tax adjustments.
  - (C) Exclusion of certain financial statement items.
  - (D) Changes in method of accounting.
  - (E) Examples.
- (iv) De minimis rule exceptions for certain direct costs.
  - (A) In general.
  - (B) De minimis rule for certain direct labor costs.
  - (C) De minimis rule for certain direct material costs.
  - (D) Taxpayers using a historic absorption ratio.
  - (E) Examples.
  - (v) Safe harbor method for certain variances and under or over-applied burdens.
    - (A) In general.
    - (B) Consistency requirement.
    - (C) Allocation of variances and under or over-applied burdens between production and preproduction costs under the modified simplified production method.
    - (D) Allocation of variances and under or over-applied burdens between storage and handling costs absorption ratio and purchasing costs absorption ratio under the simplified resale method.
    - (E) Method of accounting.
  - (vi) Removal of section 471 costs.
  - (vii) Method changes.
- (3) \* \* \*
- (i) In general.
- (ii) Negative adjustments.
  - (A) In general.
  - (B) Exception for certain taxpayers removing costs from section 471 costs.
  - (C) No negative adjustments for cash or trade discounts.
  - (D) No negative adjustments for certain expenses.
  - (E) Consistency requirement for negative adjustments.
- (4) Section 263A costs.

- (5) Classification of costs.
- (6) Financial statement.
  - \* \* \* \* \*

§ 1.263A-2 Rules Relating to Property Produced by the Taxpayer.

\* \* \* \* \*

- (b) \* \* \*
- (4) \* \* \*
- (v) \* \* \*
- (A) Transition to elect historic absorption ratio.
  - (B) Transition to revoke historic absorption ratio.
    - \* \* \* \* \*
- (c) Modified simplified production method.
  - (1) Introduction.
  - (2) Eligible property.
    - (i) In general.
    - (ii) Election to exclude self-constructed assets.
    - (3) Modified simplified production method without historic absorption ratio election.
      - (i) General allocation formula.
        - (A) In general.
        - (B) Effect of allocation.
      - (ii) Definitions.
        - (A) Direct material costs.
        - (B) Pre-production absorption ratio.
          - (1) Pre-production additional section 263A costs.
          - (2) Pre-production section 471 costs.
          - (C) Pre-production section 471 costs remaining on hand at year end.
          - (D) Production absorption ratio.
            - (1) Production additional section 263A costs.
            - (2) Residual pre-production additional section 263A costs.
            - (3) Production section 471 costs.
            - (4) Direct materials adjustment.
            - (E) Production section 471 costs remaining on hand at year end.
            - (F) Costs allocated to property sold.
      - (iii) Allocable mixed service costs.
        - (A) In general.
        - (B) Taxpayer using the simplified service cost method.
        - (C) De minimis rule.
        - (iv) LIFO taxpayers electing the modified simplified production method.
          - (A) In general.
          - (B) LIFO increment.
          - (1) In general.

- (2) Combined absorption ratio defined.
- (C) LIFO decrement.
- (v) De minimis rule for producers with total indirect costs of \$200,000 or less.
- (vi) Examples.
- (4) Modified simplified production method with historic absorption ratio election.
  - (i) In general.
  - (ii) Operating rules and definitions.
    - (A) Pre-production historic absorption ratio.
    - (B) Production historic absorption ratio.
  - (iii) LIFO taxpayers making the historic absorption ratio election.
    - (A) In general.
    - (B) Combined historic absorption ratio.
      - (1) Total allocable additional section 263A costs incurred during the test period.
      - (2) Total section 471 costs remaining on hand at each year end of the test period.
      - (iv) Extension of qualifying period.
      - (v) Examples.
    - (d) Additional simplified methods for producers.
      - (e) Cross reference.
      - (f) Change in method of accounting.
        - (1) In general.
        - (2) Scope limitations.
        - (3) Audit protection.
        - (4) Section 481(a) adjustment.
        - (5) Time for requesting change.
      - (g) Effective/applicability date.

§ 1.263A-3 Rules Relating to Property Acquired for Resale

\* \* \* \* \*

- (d) \* \* \*
- (4) \* \* \*
- (v) \* \* \*
- (A) Transition to elect historic absorption ratio.
- (B) Transition to revoke historic absorption ratio.
  - \* \* \* \* \*

Par. 3. Section 1.263A-1 is amended by:

1. Revising the last sentence of paragraph (c)(1).
2. Revising paragraphs (d)(2) and (3).
3. Adding paragraphs (d)(5) and (6).
4. Revising the third sentence of paragraph (f)(1).
5. In paragraphs (f)(3)(i)(C) and (f)(3)(ii)(B), removing the language “fi-

nancial reports” and adding “financial statement” in its place.

6. Revising paragraph (h)(9).

7. Adding paragraph (l)(5).

The revisions and additions read as follows:

*§ 1.263A-1 Uniform capitalization of costs.*

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* See however, the simplified production method, the modified simplified production method, and the simplified resale method in §§ 1.263A-2(b) and (c) and 1.263A-3(d).

\* \* \* \* \*

(d) \* \* \*

(2) *Section 471 costs—(i) In general.* Except as otherwise provided in paragraphs (d)(2)(ii), (iv), (v), and (vi) of this section, for purposes of section 263A, a taxpayer’s section 471 costs are the types of costs, other than interest, that a taxpayer capitalizes to property produced or property acquired for resale in its financial statement. Thus, although section 471 applies only to inventories, section 471 costs include any non-inventory costs, other than interest, that a taxpayer capitalizes to, or includes in acquisition or production costs of, property produced or property acquired for resale in its financial statement. Except as otherwise provided in paragraph (d)(2)(iii) of this section, a taxpayer determines the amounts of section 471 costs by using the amounts of such costs that are incurred in the taxable year for federal income tax purposes.

(ii) *Inclusion of direct costs—(A) In general.* Notwithstanding the last sentence of paragraph (g)(2) of this section, a taxpayer’s section 471 costs must include all direct costs of property produced and property acquired for resale, whether or not a taxpayer capitalizes these costs to property produced or property acquired for resale in its financial statement. See paragraph (e)(2) of this section for a description of direct costs of property produced and property acquired for resale.

(B) *Allocation of direct costs.* Except for any direct costs that are treated as additional section 263A costs under paragraphs (d)(2)(iv) and (v) of this section, a taxpayer’s direct costs of property pro-

duced and property acquired for resale must be allocated using a method provided in paragraph (f) of this section.

(iii) *Alternative method to determine amounts of section 471 costs by using taxpayer’s financial statement—(A) In general.* In lieu of determining the amounts of section 471 costs under paragraph (d)(2)(i) of this section, a taxpayer described in paragraph (d)(3)(ii)(B) of this section may determine the amounts of section 471 costs by using the amounts of such costs that are incurred in the taxable year in its financial statement using the taxpayer’s financial statement methods of accounting if the taxpayer’s financial statement is described in paragraph (d)(6)(i), (ii), or (iii) of this section. If the taxpayer’s financial statement is described only in paragraph (d)(6)(iv) of this section, the taxpayer may not use the alternative method described in this paragraph (d)(2)(iii) and must use the method described in paragraph (d)(2)(i) of this section to determine its amounts of section 471 costs. A taxpayer using the alternative method described in this paragraph (d)(2)(iii) must remove all section 471 costs described in paragraph (d)(2)(vi) of this section, if any, by including negative adjustments in additional section 263A costs. A taxpayer using the alternative method described in this paragraph (d)(2)(iii) applies the method to all of its section 471 costs, including costs described under paragraphs (d)(2)(ii), (iv), (v), and (vi) of this section.

(B) *Book-to-tax adjustments.* A taxpayer using the alternative method described in this paragraph (d)(2)(iii) must include as additional section 263A costs all negative and positive adjustments required to be made as a result of differences in the book and tax amounts of the taxpayer’s section 471 costs, including adjustments for direct costs required to be added to section 471 costs under paragraph (d)(2)(ii) of this section, and costs removed from section 471 costs under paragraphs (d)(2)(vi) and (d)(3)(ii)(B) of this section. In addition, the taxpayer must include as additional section 263A costs all negative and positive adjustments required to be made as a result of differences in the book and tax amounts of section 471 costs that are treated as additional section 263A costs (for example, de-

minimis direct costs described in paragraph (d)(2)(iv) of this section and certain variances and under or over-applied burdens described in paragraph (d)(2)(v) of this section). For purposes of determining the negative and positive adjustments required to be made as a result of differences in book and tax amounts for a taxpayer using the burden rate or standard cost methods described in paragraph (f)(3) of this section, the taxpayer compares the actual amount of the cost incurred in the taxable year for federal income tax purposes to the actual amount of the cost incurred in the taxable year in its financial statement using the taxpayer’s financial statement methods of accounting, regardless of how the taxpayer treats its variances or under or over-applied burdens.

(C) *Exclusion of certain financial statement items.* A taxpayer that determines the amounts of section 471 costs under this paragraph (d)(2)(iii) may not include any financial statement write-downs, reserves, or other financial statement valuation adjustments when determining the amounts of its section 471 costs.

(D) *Changes in method of accounting.* The use of this method to determine the amounts of section 471 costs under this paragraph (d)(2)(iii) is the adoption of, or a change in, a method of accounting under section 446 of the Internal Revenue Code.

(E) *Examples.* The following examples illustrate this paragraph (d)(2)(iii):

(1) *Example 1—Alternative-method taxpayer using de minimis direct labor costs rule.* Taxpayer P uses the modified simplified production method described in § 1.263A-2(c) and determines its amounts of section 471 costs by using the alternative method under paragraph (d)(2)(iii) of this section. Additionally, P uses the de minimis direct labor costs rule under paragraph (d)(2)(iv)(B) of this section. P does not capitalize vacation pay or holiday pay to property produced or property acquired for resale in its financial statement but does capitalize all other direct labor costs to such property in its financial statement. On its 2018 financial statement, P incurs \$3,500,000 of total direct labor costs, including \$110,000 of vacation pay costs and \$10,000 of holiday pay costs. For federal income tax purposes, P incurs \$150,000 of vacation pay costs and \$18,000 of holiday pay costs in the taxable year. P’s uncapitalized direct labor costs are \$120,000 (\$110,000 of vacation pay plus \$10,000 of holiday pay). For purposes of the five percent test in paragraph (d)(2)(iv)(B) of this section, P’s uncapitalized direct labor costs are 3.43% of total direct labor costs (\$120,000 divided by \$3,500,000). Accordingly, under paragraph (d)(2)(iv)(B) of this section, P includes \$120,000 in



its additional section 263A costs and excludes that amount from its section 471 costs in the taxable year. Additionally, pursuant to paragraph (d)(2)(iii)(B) of this section, P includes in additional section 263A costs a positive book-to-tax adjustment of \$40,000 for vacation pay costs (\$150,000 tax amount - \$110,000 book amount) and a positive book-to-tax adjustment of \$8,000 for holiday pay costs (\$18,000 tax amount - \$10,000 book amount).

(2) *Example 2—Alternative-method taxpayer with under and over-applied burdens that uses safe harbor rule for certain variances and under or over-applied burdens.* Taxpayer X uses the modified simplified production method described in § 1.263A-2(c) and determines its amounts of section 471 costs by using the alternative method under paragraph (d)(2)(iii) of this section. In 2018, X uses a burden rate method for book purposes to allocate costs to Products A and B, and does not capitalize any under or over-applied burdens to property produced or property acquired for resale in its financial statement. X does not allocate costs to any other products using a burden rate method, and X does not allocate costs to any products using a standard cost method. On its 2018 financial statement, using X's burden rate, the total amount of predetermined indirect costs for Product A is \$545,000 and the total amount of actual indirect costs incurred for Product A is \$550,000; accordingly, X has an under-applied burden of \$5,000 for Product A. For federal income tax purposes, the actual indirect costs incurred in 2018 for Product A is \$560,000. Additionally, on its 2018 financial statement, using X's burden rate, the total amount of predetermined indirect costs for Product B is \$250,000 and the total amount of actual indirect costs incurred for Product B is \$225,000; accordingly, X has an over-applied burden of \$25,000 for Product B. For federal income tax purposes, the actual indirect costs incurred in 2018 for Product B is \$240,000. X uses the safe harbor rule for certain variances and under or over-applied burdens. Prior to the application of this safe harbor rule, X's total section 471 costs for 2018 for Products A and B (the only items to which X allocates costs using a standard cost method or burden rate method) are \$2,000,000, which includes \$550,000 actual indirect costs for Product A, \$225,000 actual indirect costs for Product B, and \$1,225,000 of other section 471 costs for Products A and B that are not allocated under X's burden rate method. For purposes of determining the amount of uncanceled variances and uncanceled under or over-applied burdens for the five percent test in paragraph (d)(2)(v)(A) of this section, X's under and over-applied burdens for Products A and B are treated as positive amounts. Consequently, the sum of X's uncanceled variances and uncanceled under or over-applied burdens is \$30,000 (\$5,000 under-applied burden for Product A plus \$25,000 over-applied burden for Product B). Accordingly, under paragraph (d)(2)(v)(A) of this section, the sum of X's uncanceled variances and uncanceled under or over-applied burdens is 1.5% of X's total section 471 costs for all items to which it allocates costs using a standard cost method or burden rate method (\$30,000 divided by \$2,000,000), and X includes a positive \$5,000 under-applied burden for Product A and a negative \$25,000 over-applied burden for

Product B in its additional section 263A costs, and excludes those amounts from its section 471 costs. Additionally, pursuant to paragraph (d)(2)(iii)(B) of this section, X includes in its additional section 263A costs a positive book-to-tax adjustment of \$10,000 for Product A (\$560,000 actual cost tax amount - \$550,000 actual cost book amount) and a positive book-to-tax adjustment of \$15,000 for Product B (\$240,000 actual tax amount cost - \$225,000 actual book amount cost) in the taxable year.

(iv) *De minimis rule exceptions for certain direct costs—(A) In general.* Notwithstanding paragraph (d)(2)(ii) of this section, a taxpayer that uses the simplified resale method, the simplified production method, or the modified simplified production method, and that does not capitalize certain direct costs to property produced or property acquired for resale in its financial statement (uncanceled direct labor costs or uncanceled direct material costs), may use either or both the de minimis direct labor costs rule or the de minimis direct material costs rule to include in additional section 263A costs, and exclude from section 471 costs, certain uncanceled direct labor costs or uncanceled direct material costs that are incurred in the taxable year as provided in paragraphs (d)(2)(iv)(B) and (C) of this section, respectively. The use of the de minimis rules described in paragraphs (d)(2)(iv)(B) and (C) of this section is the adoption of, or a change in, a method of accounting under section 446 of the Internal Revenue Code.

(B) *De minimis rule for certain direct labor costs.* A taxpayer described in paragraph (d)(2)(iv)(A) of this section that uses the de minimis rule described in this paragraph (d)(2)(iv)(B) includes in additional section 263A costs, and excludes from section 471 costs, the sum of the amounts of all of those uncanceled direct labor costs that are incurred in the taxable year, if that sum is less than five percent of total direct labor costs incurred in the taxable year (whether or not capitalized in the taxpayer's financial statement), or another amount specified in other published guidance (see § 601.601(d)(2) of this chapter). For purposes of determining the amount of uncanceled direct labor costs for this five percent test, any amounts that constitute a reduction to costs are treated as a positive amount. The amounts of uncanceled direct labor costs used for the five percent test, and the amounts of uncanceled direct labor costs included in additional

section 263A costs under this paragraph (d)(2)(iv)(B), must not include amounts relating to basic compensation or overtime, or the types of costs included in the taxpayer's standard cost or burden rate methods used for section 471 costs (but see paragraphs (d)(2)(v) and (f)(3)(i)(C) of this section for special rules for certain variances and under or over-applied burdens).

(C) *De minimis rule for certain direct material costs.* A taxpayer described in paragraph (d)(2)(iv)(A) of this section that uses the de minimis rule described in this paragraph (d)(2)(iv)(C) includes in additional section 263A costs, and excludes from section 471 costs, the sum of the amounts of all of those uncanceled direct material costs that are incurred in the taxable year, if that sum is less than five percent of total direct material costs incurred in the taxable year (whether or not capitalized in the taxpayer's financial statement), or another amount specified in other published guidance (see § 601.601(d)(2) of this chapter). For purposes of determining the amount of uncanceled direct material costs for this five percent test, any amounts that constitute a reduction to costs, such as cash and trade discounts, are treated as a positive amount. The amounts of uncanceled direct material costs used for the five percent test, and the amounts of uncanceled direct material costs included in additional section 263A costs under this paragraph (d)(2)(iv)(C), must not include the types of costs included in the taxpayer's standard cost method used for section 471 costs (but see paragraphs (d)(2)(v) and (f)(3)(ii)(B) of this section for special rules for certain variances).

(D) *Taxpayers using a historic absorption ratio.* A taxpayer that uses the historic absorption ratio provided in § 1.263A-2(b)(4) or (c)(4) or § 1.263A-3(d)(4), and that uses a de minimis rule described in paragraph (d)(2)(iv) of this section during its test period or updated test period, determines whether direct labor costs or direct material costs, as applicable, are included in any of its section 471 costs remaining on hand at year end during its qualifying period or extended qualifying period according to how those direct labor costs or direct material costs, respectively, are identified in at least two of the three years of the taxpayer's applicable test pe-

riod or updated test period. If a taxpayer described in this paragraph (d)(2)(iv)(D) is required to revise any of its actual absorption ratios for its test period or updated test period as a result of a change in a method of accounting, the taxpayer determines whether direct labor costs or direct material costs, as applicable, are included in any of its section 471 costs on hand at year end during a qualifying period or extended qualifying period according to how those direct labor costs or direct material costs, respectively, are identified in the taxpayer's revised actual absorption ratios during its applicable test period or updated test period.

(E) *Examples.* The following examples illustrate this paragraph (d)(2)(iv):

(1) *Example 1—Taxpayer using de minimis direct material costs rule.* Taxpayer R uses the modified simplified production method described in § 1.263A-2(c) and the de minimis method of accounting under paragraph (d)(2)(iv)(C) of this section. In 2018, R does not capitalize freight-in costs or trade discounts to property produced or property acquired for resale in its financial statement but does capitalize all other direct material costs to such property in its financial statement. R incurs total direct material costs of \$3,105,000, which represents invoice price of \$3,000,000 on goods purchased, plus \$120,000 of freight-in costs, less \$15,000 for trade discounts. For purposes of determining the amount of uncanceled direct material costs for the five percent test in paragraph (d)(2)(iv)(C) of this section, R's trade discounts are treated as a positive amount. Consequently, R's uncanceled direct material costs for purposes of the five percent test are \$135,000 (\$120,000 of freight-in plus \$15,000 of trade discounts). Accordingly, under paragraph (d)(2)(iv)(C) of this section, R's uncanceled direct material costs are 4.35% of total direct material costs (\$135,000 divided by \$3,105,000), and R includes a positive \$120,000 of freight-in and a negative \$15,000 of trade discounts in its additional section 263A costs and excludes those amounts from its section 471 costs in the taxable year.

(2) *Example 2—Taxpayer using de minimis direct labor costs rule and historic absorption ratio.* Taxpayer S uses the historic absorption ratio provided in § 1.263A-2(c)(4). S uses the de minimis method of accounting under paragraph (d)(2)(iv)(B). S excludes certain uncanceled direct labor costs from its section 471 costs (and includes them in additional section 263A costs) under paragraph (d)(2)(iv)(B) of this section in Years 1 and 3 of its applicable test period. Because S excluded direct labor costs from its section 471 costs in at least two of the three years of its applicable test period, S must exclude those same costs from its pre-production and production section 471 costs remaining on hand at year end during its qualifying period or extended qualifying period.

(v) *Safe harbor method for certain variances and under or over-applied burdens—(A) In general.* Notwithstanding

paragraphs (d)(2)(i) and (ii), (f)(3)(i)(C), and (f)(3)(ii)(B) of this section, a taxpayer that uses the simplified resale method, the simplified production method, or the modified simplified production method, may use the safe harbor method described in this paragraph (d)(2)(v)(A) for all of its variances and under or over-applied burdens that are not capitalized to property produced or property acquired for resale in its financial statement (uncanceled variances and uncanceled under or over-applied burdens). A taxpayer using this safe harbor method must include in additional section 263A costs, and exclude from section 471 costs, the sum of the amounts of all of those uncanceled variances and uncanceled under or over-applied burdens for the taxable year, if that sum is less than five percent of the taxpayer's total section 471 costs for all items to which it allocates costs using a standard cost method or burden rate method, or another percentage specified in other published guidance (see § 601.601(d)(2) of this chapter). If the sum of uncanceled variances and uncanceled under or over-applied burdens is not less than this five percent threshold, the taxpayer may not exclude such uncanceled variances and uncanceled under or over-applied burdens from section 471 costs, and must reallocate such uncanceled variances and uncanceled under or over-applied burdens to or among the units of property to which the costs are allocable in accordance with paragraphs (f)(3)(i)(C) and (f)(3)(ii)(B) of this section (but see paragraph (d)(2)(v)(B) of this section for a rule that a taxpayer using the safe harbor method described in this paragraph (d)(2)(v)(A) may not use the methods of accounting described in paragraphs (f)(3)(i)(C) and (f)(3)(ii)(B) of this section to treat certain uncanceled variances and certain uncanceled under or over-applied burdens as not allocable to property). For purposes of determining the amounts of uncanceled variances and uncanceled under or over-applied burdens for this five percent test, all variances and under or over-applied burdens are treated as positive amounts. Additionally, for purposes of this five percent test, a taxpayer's total section 471 costs for all items to which it allocates costs using a standard cost method or burden rate method are determined before application of the safe harbor method described in this paragraph

(d)(2)(v)(A), and therefore this amount must reflect the actual amounts incurred by the taxpayer for those items during the taxable year, which includes variances and under or over-applied burdens. The variances described in this paragraph (d)(2)(v)(A) include any variances on cash or trade discounts, if those discounts are capitalized as part of the taxpayer's standard cost method used for section 471 costs.

(B) *Consistency requirement.* A taxpayer using the safe harbor method described in paragraph (d)(2)(v)(A) of this section must use the method consistently for all items to which it allocates costs using a standard cost method or burden rate method and may not use the methods of accounting described in paragraphs (f)(3)(i)(C) and (f)(3)(ii)(B) of this section to treat its uncanceled variances and uncanceled under or over-applied burdens that are not significant in amount relative to the taxpayer's total indirect costs incurred with respect to production and resale activities for the year as not allocable to property produced or property acquired for resale.

(C) *Allocation of variances and under or over-applied burdens between production and preproduction costs under the modified simplified production method.* In the case of a taxpayer using the modified simplified production method and the safe harbor method described in paragraph (d)(2)(v)(A) of this section, uncanceled variances and uncanceled under or over-applied burdens treated as additional section 263A costs under the safe harbor method must be allocated between production additional section 263A costs, as described in § 1.263A-2(c)(3)(ii)(D)(1), and pre-production additional section 263A costs, as described in § 1.263A-2(c)(3)(ii)(B)(1), using any reasonable method. In the case of a taxpayer using the modified simplified production method and the safe harbor method described in paragraph (d)(2)(v)(A) of this section, uncanceled variances and uncanceled under or over-applied burdens that are not excluded from section 471 costs must be allocated between production section 471 costs, as described in § 1.263A-2(c)(3)(ii)(D)(3), and pre-production section 471 costs, as described in § 1.263A-2(c)(3)(ii)(B)(2) based on the taxpayer's reallocation of such uncanceled vari-

ances and uncapitalized under or over-applied burdens to or among the units of property to which the costs are allocable in accordance with paragraphs (f)(3)(i)(C) and (f)(3)(ii)(B) of this section, as described in paragraph (d)(2)(v)(A) of this section.

(D) *Allocation of variances and under or over-applied burdens between storage and handling costs absorption ratio and purchasing costs absorption ratio under the simplified resale method.* In the case of a taxpayer using the simplified resale method, any uncapitalized variances and uncapitalized under or over-applied burdens treated as additional section 263A costs under the safe harbor method described in paragraph (d)(2)(v)(A) of this section must be allocated between storage and handling costs, as described in § 1.263A-3(d)(3)(i)(D)(2), and current year's purchasing costs, as described in § 1.263A-3(d)(3)(i)(E)(2), using any reasonable method.

(E) *Method of accounting.* The use of the safe harbor method described in this paragraph (d)(2)(v) is the adoption of, or a change in, a method of accounting under section 446 of the Internal Revenue Code.

(vi) *Removal of section 471 costs.* A taxpayer must remove those costs included in its section 471 costs that are not permitted to be capitalized under either paragraph (c)(2) or (j)(2)(ii) of this section and those costs included in its section 471 costs that are eligible for capitalization under paragraph (j)(2) of this section that the taxpayer does not elect to capitalize under section 263A. Except as otherwise provided in paragraph (d)(3)(ii)(B) of this section, a taxpayer must remove costs pursuant to this paragraph (d)(2)(vi) by adjusting its section 471 costs and may not remove the costs by including a negative adjustment in its additional section 263A costs. A taxpayer that removes costs pursuant to this paragraph (d)(2)(vi) by adjusting its section 471 costs must use a reasonable method that approximates the manner in which the taxpayer originally capitalized the costs to its property produced or property acquired for resale in its financial statement.

(vii) *Method changes.* A taxpayer using the simplified production method, simplified resale method, or the modified simplified production method and that

changes its financial statement practices for a cost in a manner that would change its section 471 costs is required to change its method of accounting for federal income tax purposes. A taxpayer may change its method of accounting for determining section 471 costs only with the consent of the Commissioner as required under section 446(e) and the corresponding regulations.

(3) *Additional section 263A costs—(i) In general.* Additional section 263A costs are the costs, other than interest, that are not included in a taxpayer's section 471 costs but that are required to be capitalized under section 263A. Additional section 263A costs generally do not include the direct costs that are required to be included in a taxpayer's section 471 costs under paragraph (d)(2)(ii) of this section; however, additional section 263A costs must include any direct costs excluded from section 471 costs under paragraphs (d)(2)(iv) and (v) of this section. For a taxpayer using the alternative method described in paragraph (d)(2)(iii) of this section, additional section 263A costs must also include any negative or positive adjustments required to be made as a result of differences in the book and tax amounts of the taxpayer's section 471 costs.

(ii) *Negative adjustments—(A) In general.* Except as otherwise provided by regulations or other published guidance (see § 601.601(d)(2) of this chapter), a taxpayer may not include negative adjustments in additional section 263A costs. However, for a taxpayer using the alternative method described in paragraph (d)(2)(iii) of this section, see paragraph (d)(2)(iii)(B) of this section for negative or positive adjustments required to be made as a result of differences in the book and tax amounts of the taxpayer's section 471 costs.

(B) *Exception for certain taxpayers removing costs from section 471 costs.* Notwithstanding paragraphs (d)(2)(vi) and (d)(3)(ii)(A) of this section, and except as otherwise provided in paragraphs (d)(3)(ii)(C) and (D) of this section, the following taxpayers may, but are not required to, include negative adjustments in additional section 263A costs to remove the taxpayer's section 471 costs that are described in paragraph (d)(2)(vi) of this section (costs that are not required to be,

or are not permitted to be, capitalized under section 263A):

(1) A taxpayer using the simplified production method under § 1.263A-2(b) if the taxpayer's (or its predecessor's) average annual gross receipts for the three previous taxable years (test period) do not exceed \$50,000,000, or another amount specified in other published guidance (see § 601.601(d)(2) of this chapter). The rules of § 1.263A-3(b) apply for purposes of determining the amount of a taxpayer's gross receipts and the test period;

(2) A taxpayer using the modified simplified production method under § 1.263A-2(c); and

(3) A taxpayer using the simplified resale method under § 1.263A-3(d).

(C) *No negative adjustments for cash or trade discounts.* A taxpayer may not include negative adjustments in additional section 263A costs for cash or trade discounts described in § 1.471-3(b). However, see paragraph (d)(2)(iv)(C) of this section for a de minimis rule for certain direct material costs that may be included in additional section 263A costs and paragraph (d)(2)(v) of this section for certain variance amounts that may be included in additional section 263A costs.

(D) *No negative adjustments for certain expenses.* A taxpayer may not include negative adjustments in additional section 263A costs for an amount which is of a type for which a deduction would be disallowed under section 162(c), (e), (f), or (g) and the regulations thereunder in the case of a business expense.

(E) *Consistency requirement for negative adjustments.* A taxpayer that is permitted to include negative adjustments in additional section 263A costs to remove section 471 costs under paragraph (d)(3)(ii)(B) of this section and that includes negative adjustments to remove section 471 costs must use that method of accounting to remove all section 471 costs required to be removed under paragraph (d)(2)(vi) of this section.

\* \* \* \* \*

(5) *Classification of costs.* A taxpayer must classify section 471 costs, additional section 263A costs, and any permitted adjustments to section 471 or additional section 263A costs, using the narrower of the classifications of costs described in paragraphs (e)(2), (3), and (4) of this section,



whether or not the taxpayer is required to maintain inventories, or the classifications of costs used by a taxpayer in its financial statement. If a cost is not described in paragraph (e)(2), (3), or (4) of this section, the cost is to be classified using the classification of costs used in the taxpayer's financial statement.

(6) *Financial statement.* For purposes of section 263A, financial statement means the taxpayer's financial statement listed in paragraphs (d)(6)(i) through (iv) of this section that has the highest priority, including within paragraphs (d)(6)(ii) and (iv) of this section. The financial statements are, in descending priority:

(i) A financial statement required to be filed with the Securities and Exchange Commission (SEC) (the 10-K or the Annual Statement to Shareholders);

(ii) A certified audited financial statement that is accompanied by the report of an independent certified public accountant (or in the case of a foreign entity, by the report of a similarly qualified independent professional) that is used for:

(A) Credit purposes;

(B) Reporting to shareholders, partners, or similar persons; or

(C) Any other substantial non-tax purpose;

(iii) A financial statement (other than a tax return) required to be provided to the federal or a state government or any federal or state agency (other than the SEC or the Internal Revenue Service); or

(iv) A financial statement that is used for:

(A) Credit purposes;

(B) Reporting to shareholders, partners, or similar persons; or

(C) Any other substantial non-tax purpose.

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \* In addition, in lieu of a facts-and-circumstances allocation method, taxpayers may use the simplified methods provided in §§ 1.263A-2(b) and (c) and 1.263A-3(d) to allocate direct and indirect costs to eligible property produced or eligible property acquired for resale; see those sections for definitions of eligible property.\* \* \*

\* \* \* \* \*

(h) \* \* \*

(9) *Separate election.* A taxpayer may elect the simplified service cost method in conjunction with any other allocation method used at the trade or business level, including the simplified methods described in §§ 1.263A-2(b) and (c) and 1.263A-3(d). However, the election of the simplified service cost method must be made independently of the election to use those other simplified methods.

\* \* \* \* \*

(l) \* \* \*

(5) *Definitions of section 471 costs and additional section 263A costs.* Paragraphs (d)(2) and (3) of this section apply for taxable years beginning on or after November 20, 2018. For any taxable year that both begins before November 20, 2018 and ends after November 20, 2018, the IRS will not challenge return positions consistent with all of paragraphs (d)(2) and (3) of this section.

Par. 4. Section 1.263A-2 is amended by:

1. Revising paragraph (a)(5).

2. Designating the text of paragraph (b)(4)(v) as paragraph (b)(4)(v)(A) and adding a paragraph heading.

3. Adding paragraph (b)(4)(v)(B).

4. Redesignating paragraphs (c), (d), (e), and (f) as paragraphs (d), (e), (f), and (g).

5. Adding a new paragraph (c).

6. Adding paragraph (g)(3).

The revision and additions read as follows:

§ 1.263A-2 *Rules relating to property produced by the taxpayer.*

(a) \* \* \*

(5) *Taxpayers required to capitalize costs under this section.* This section generally applies to taxpayers that produce property. If a taxpayer is engaged in both production activities and resale activities, the taxpayer applies the principles of this section as if it read production or resale activities, and by applying appropriate principles from § 1.263A-3. If a taxpayer is engaged in both production and resale activities, the taxpayer may elect the simplified production method or the modified simplified production method provided in this section, but generally may not elect the simplified resale method discussed in § 1.263A-3(d). If elected, the simplified production method or the modified simplified production method must be applied

to all eligible property produced and all eligible property acquired for resale by the taxpayer.

(b) \* \* \*

(4) \* \* \*

(v) \* \* \*

(A) *Transition to elect historic absorption ratio.* \* \* \*

(B) *Transition to revoke historic absorption ratio.* Notwithstanding the requirements provided in paragraph (b)(4)(iii)(B) of this section regarding revocations of the historic absorption ratio during a qualifying period, a taxpayer will be permitted to revoke the historic absorption ratio in their first, second, or third taxable year ending on or after November 20, 2018, under such administrative procedures and with terms and conditions prescribed by the Commissioner.

\* \* \* \* \*

(c) *Modified simplified production method—(1) Introduction.* This paragraph (c) provides a simplified method for determining the additional section 263A costs properly allocable to ending inventories of property produced and other eligible property on hand at the end of the taxable year.

(2) *Eligible property—(i) In general.* Except as otherwise provided in paragraph (c)(2)(ii) of this section, the modified simplified production method, if elected for any trade or business of a producer, must be used for all production and resale activities associated with any of the categories of property to which section 263A applies as described in paragraph (b)(2)(i) of this section.

(ii) *Election to exclude-self-constructed assets.* A taxpayer using the modified simplified production method may elect to exclude self-constructed assets from application of the modified simplified production method by following the same rules applicable to a taxpayer using the simplified production method provided in paragraph (b)(2)(ii) of this section.

(3) *Modified simplified production method without historic absorption ratio election—(i) General allocation formula—(A) In general.* Except as otherwise provided in paragraph (c)(3)(v) of this section, the additional section 263A costs allocable to eligible property remaining on hand at the close of the taxable year under the modified simplified production

method are computed as follows:

$$\left( \begin{array}{c} \text{Pre-production} \\ \text{absorption ratio} \end{array} \times \begin{array}{c} \text{Pre-production} \\ \text{section 471 costs} \\ \text{remaining on hand at} \\ \text{year end} \end{array} \right) + \left( \begin{array}{c} \text{Production} \\ \text{absorption ratio} \end{array} \times \begin{array}{c} \text{Production} \\ \text{section 471 costs} \\ \text{remaining on hand at} \\ \text{year end} \end{array} \right)$$

(B) *Effect of allocation.* The pre-production and production absorption ratios generally are multiplied by the pre-production and production section 471 costs, respectively, remaining in ending inventory or otherwise on hand at the end of each taxable year in which the modified simplified production method is applied. The sum of the resulting products is the additional section 263A costs that are added to the taxpayer's ending section 471 costs to determine the section 263A costs that are capitalized. See, however,

paragraph (c)(3)(iv) of this section for special rules applicable to LIFO taxpayers. Except as otherwise provided in this section or in § 1.263A-1 or § 1.263A-3, additional section 263A costs that are allocated to inventories on hand at the close of the taxable year under the modified simplified production method of this paragraph (c) are treated as inventory costs for all purposes of the Internal Revenue Code.

(ii) *Definitions—(A) Direct material costs.* For purposes of paragraph (c) of this section, direct material costs has the

same meaning as described in § 1.263A-1(e)(2)(i)(A). For purposes of paragraph (c) of this section, direct material costs include property produced for the taxpayer under a contract with another party that are direct material costs for the taxpayer to be used in an additional production process of the taxpayer.

(B) *Pre-production absorption ratio.* Under the modified simplified production method, the pre-production absorption ratio is determined as follows:

#### Pre-production additional section 263A costs

##### Pre-production section 471 costs

(1) *Pre-production additional section 263A costs.* Pre-production additional section 263A costs are defined as the additional section 263A costs described in § 1.263A-1(d)(3) that are pre-production costs, as described in paragraph (a)(3)(ii) of this section, that a taxpayer incurs during its current taxable year, including capitalizable mixed service costs allocable to pre-production additional section 263A costs, as described in paragraph (c)(3)(iii) of this section, that a taxpayer incurs during its current taxable year:

(i) Plus additional section 263A costs properly allocable to property acquired for resale that a taxpayer incurs during its current taxable year; and

(ii) Plus additional section 263A costs properly allocable to property produced for the taxpayer under a contract with

another party that is treated as property produced by the taxpayer, as described in paragraph (a)(1)(ii)(B) of this section, that a taxpayer incurs during its current taxable year.

(2) *Pre-production section 471 costs.* Pre-production section 471 costs are defined as the section 471 costs described in § 1.263A-1(d)(2) that are direct material costs that a taxpayer incurs during its current taxable year plus the section 471 costs for property acquired for resale (see § 1.263A-1(e)(2)(ii)) that a taxpayer incurs during its current taxable year, including property produced for the taxpayer under a contract with another party that is acquired for resale.

(C) *Pre-production section 471 costs remaining on hand at year end.* Pre-production section 471 costs remaining on

hand at year end means the pre-production section 471 costs, as defined in paragraph (c)(3)(ii)(B)(2) of this section, that a taxpayer incurs during its current taxable year which remain in its ending inventory or are otherwise on hand at year end, excluding the section 471 costs that are direct material costs that have entered or completed production at year end (for example, direct material costs in ending work-in-process inventory and ending finished goods inventory). For LIFO inventories of a taxpayer, see paragraph (c)(3)(iv) of this section.

(D) *Production absorption ratio.* Under the modified simplified production method, the production absorption ratio is determined as follows:

#### (Production additional section 263A costs + Residual pre-production additional section 263A costs)

##### (Production section 471 costs + Direct materials adjustment)

(1) *Production additional section 263A costs.* Production additional section 263A costs are defined as the additional section 263A costs described in § 1.263A-1(d)(3) that are not pre-production additional section 263A costs, as defined in paragraph (c)(3)(ii)(B)(1) of this section, that a taxpayer incurs during its current taxable year, including capitalizable mixed service costs not allocable to pre-production

additional section 263A costs, as described in paragraph (c)(3)(iii) of this section, that a taxpayer incurs during its current taxable year. For example, production additional section 263A costs include post-production costs, other than post-production costs included in section 471 costs, as described in paragraph (a)(3)(iii) of this section.

(2) *Residual pre-production additional section 263A costs.* Residual pre-production additional section 263A costs are defined as the pre-production additional section 263A costs, as defined in paragraph (c)(3)(ii)(B)(1) of this section, that a taxpayer incurs during its current taxable year less the product of the pre-production absorption ratio, as determined in paragraph (c)(3)(ii)(B) of this section,

and the pre-production section 471 costs remaining on hand at year end, as defined in paragraph (c)(3)(ii)(C) of this section.

(3) *Production section 471 costs.* Production section 471 costs are defined as the section 471 costs described in § 1.263A-1(d)(2) that a taxpayer incurs during its current taxable year less pre-production section 471 costs, as defined in paragraph (c)(3)(ii)(B)(2) of this section, that a taxpayer incurs during its current taxable year.

(4) *Direct materials adjustment.* The direct materials adjustment is defined as the section 471 costs that are direct material costs, including property produced for a taxpayer under a contract with another party that are direct material costs for the taxpayer to be used in an additional production process of the taxpayer, that had not entered production at the beginning of the current taxable year:

(i) Plus the section 471 costs that are direct material costs incurred during the current taxable year (that is, direct material purchases); and

(ii) Less the section 471 costs that are direct material costs that have not entered production at the end of the current taxable year.

(E) *Production section 471 costs remaining on hand at year end.* Production section 471 costs remaining on hand at year end means the section 471 costs, as defined in § 1.263A-1(d)(2), that a taxpayer incurs during its current taxable year which remain in its ending inventory or are otherwise on hand at year end, less the pre-production section 471 costs remaining on hand at year end, as described in paragraph (c)(3)(ii)(C) of this section. For LIFO inventories of a taxpayer, see paragraph (c)(3)(iv) of this section.

(F) *Costs allocated to property sold.* The terms defined in paragraph (c)(3)(ii) of this section do not include costs described in § 1.263A-1(e)(3)(ii) or cost reductions described in § 1.471-3(e) that a taxpayer properly allocates entirely to property that has been sold.

(iii) *Allocable mixed service costs—(A) In general.* If a taxpayer using the modified simplified production method determines its capitalizable mixed service costs using a method described in § 1.263A-1(g)(4), the taxpayer must use a reasonable method to allocate the costs (for ex-

ample, department or activity costs) between production and pre-production additional section 263A costs. If the taxpayer's § 1.263A-1(g)(4) method allocates costs to a department or activity that is exclusively identified as production or pre-production, those costs must be allocated to production or pre-production additional section 263A costs, respectively.

(B) *Taxpayer using the simplified service cost method.* If a taxpayer using the modified simplified production method determines its capitalizable mixed service costs using the simplified service cost method described in § 1.263A-1(h), the amount of capitalizable mixed service costs, as computed using the general allocation formula in § 1.263A-1(h)(3)(i), allocated to and included in pre-production additional section 263A costs in the absorption ratio described in paragraph (c)(3)(ii)(B) of this section is determined based on either of the following: The proportion of direct material costs to total section 471 costs that a taxpayer incurs during its current taxable year or the proportion of pre-production labor costs to total labor costs that a taxpayer incurs during its current taxable year. The taxpayer must include the capitalizable mixed service costs that are not allocated to pre-production additional section 263A costs in production additional section 263A costs in the absorption ratio described in paragraph (c)(3)(ii)(D) of this section. A taxpayer that allocates capitalizable mixed service costs based on labor under this paragraph (c)(3)(iii)(B) must exclude mixed service labor costs from both pre-production labor costs and total labor costs.

(C) *De minimis rule.* Notwithstanding paragraphs (c)(3)(iii)(A) and (B) of this section, if 90 percent or more of a taxpayer's capitalizable mixed service costs determined under paragraph (c)(3)(iii)(A) or (B) of this section are allocated to pre-production additional section 263A costs or production additional section 263A costs, the taxpayer may elect to allocate 100 percent of its capitalizable mixed service costs to that amount. For example, if 90 percent of capitalizable mixed service costs are allocated to production additional section 263A costs based on the labor costs that are pre-production costs in total labor costs incurred in the taxpayer's trade or

business during the taxable year, then 100 percent of capitalizable mixed service costs may be allocated to production additional section 263A costs. An election to allocate capitalizable mixed service costs under this paragraph (c)(3)(iii)(C) is the adoption of, or a change in, a method of accounting under section 446 of the Internal Revenue Code.

(iv) *LIFO taxpayers electing the modified simplified production method—(A) In general.* Under the modified simplified production method, a taxpayer using a LIFO method must calculate a particular year's index (for example, under § 1.472-8(e)) without regard to its additional section 263A costs. Similarly, a taxpayer that adjusts current-year costs by applicable indexes to determine whether there has been an inventory increment or decrement in the current year for a particular LIFO pool must disregard the additional section 263A costs in making that determination.

(B) *LIFO increment—(1) In general.* If the taxpayer determines there has been an inventory increment, the taxpayer must state the amount of the increment in terms of section 471 costs in current-year dollars. The taxpayer then multiplies this amount by the combined absorption ratio, as defined in paragraph (c)(3)(iv)(B)(2) of this section. The resulting product is the additional section 263A costs that must be added to the taxpayer's increment in terms of section 471 costs in current-year dollars for the taxable year.

(2) *Combined absorption ratio defined.* For purposes of paragraph (c)(3)(iv)(B)(1) of this section, the combined absorption ratio is the additional section 263A costs allocable to eligible property remaining on hand at the close of the taxable year, as described in paragraph (c)(3)(i)(A) of this section, determined on a non-LIFO basis, divided by the pre-production and production section 471 costs remaining on hand at year end, determined on a non-LIFO basis.

(C) *LIFO decrement.* If the taxpayer determines there has been an inventory decrement, the taxpayer must state the amount of the decrement in dollars applicable to the particular year for which the LIFO layer has been invaded. The additional section 263A costs incurred in prior years that are applicable to the decrement are charged to cost of goods sold. The additional section 263A costs that are ap-



plicable to the decrement are determined by multiplying the additional section 263A costs allocated to the layer of the pool in which the decrement occurred by the ratio of the decrement, excluding additional section 263A costs, to the section 471 costs in the layer of that pool.

(v) *De minimis rule for producers with total indirect costs of \$200,000 or less.* Paragraph (b)(3)(iv) of this section, which provides that the additional section 263A costs allocable to eligible property remaining on hand at the close of the taxable year are deemed to be zero for pro-

ducers with total indirect costs of \$200,000 or less, applies to the modified simplified production method.

(vi) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples:

(A) *Example 1—FIFO inventory method.* (1) Taxpayer P uses the FIFO method of accounting for inventories valued at cost. P's beginning inventory for 2018 (all of which is sold during 2018) is \$2,500,000, consisting of \$500,000 of pre-production section 471 costs (including \$400,000 of direct material costs and \$100,000 of property acquired for resale), \$1,500,000 of production section 471 costs, and \$500,000 of additional section 263A costs. During 2018, P incurs \$2,500,000 of pre-

production section 471 costs (including \$1,900,000 of direct material costs and \$600,000 of property acquired for resale), \$7,500,000 of production section 471 costs, \$200,000 of pre-production additional section 263A costs, and \$800,000 of production additional section 263A costs. P's additional section 263A costs include capitalizable mixed service costs under the simplified service cost method. P's pre-production and production section 471 costs remaining in ending inventory at the end of 2018 are \$1,000,000 (including \$800,000 of direct material costs and \$200,000 of property acquired for resale) and \$2,000,000, respectively. P computes its pre-production absorption ratio for 2018 under paragraph (c)(3)(ii)(B) of this section, as follows:

$$\frac{\text{Pre-production additional section 263A costs}}{\text{Pre-production section 471 costs}} = \frac{\$200,000}{\$2,500,000} = 8.00\%$$

(2) Under paragraph (c)(3)(ii)(D)(2) of this section, P's residual pre-production additional section 263A costs for 2018 are \$120,000 (\$200,000 of pre-production additional section 263A costs less \$80,000 (the product of the 8% pre-production ab-

sorption ratio and the \$1,000,000 of pre-production section 471 costs remaining on hand at year end)).

(3) Under paragraph (c)(3)(ii)(D)(4) of this section, P's direct materials adjustment for 2018 is \$1,500,000 (\$400,000 of direct material costs in beginning raw materials inventory, plus \$1,900,000

of direct material costs incurred to acquire raw materials during the taxable year, less \$800,000 direct material costs in ending raw materials inventory).

(4) P computes its production absorption ratio for 2018 under paragraph (c)(3)(ii)(D) of this section, as follows:

$$\frac{(\text{Production additional section 263A costs} + \text{Residual pre-production additional section 263A costs})}{(\text{Production section 471 costs} + \text{Direct materials adjustment})} = \frac{(\$800,000 + 120,000)}{(\$7,500,000 + 1,500,000)} = 10.22\%$$

(5) Under the modified simplified production method, P determines the additional section 263A costs allocable to its ending inventory under paragraph (c)(3)(i)(A) of this section by multiplying the pre-production absorption ratio by the pre-production section 471 costs remaining on hand at year end and the production absorption ratio by the

production section 471 costs remaining on hand at year end, as follows:

Additional section 263A costs = (8% x \$1,000,000) + (10.22% x \$2,000,000) = \$284,400

(6) P adds this \$284,400 to the \$3,000,000 of section 471 costs remaining on hand at year end to calculate its total ending inventory of \$3,284,400.

The balance of P's additional section 263A costs incurred during 2018, \$715,600 (\$1,000,000 less \$284,400), is taken into account in 2018 as part of P's cost of goods sold.

(7) P's computation is summarized in the following table:

Beginning Inventory	Reference	Amount
Direct material costs	a	\$400,000
Property acquired for resale	b	100,000
Pre-production section 471 costs	c=a+b	500,000
Production section 471 costs	d	1,500,000
Additional section 263A costs	e	500,000
Total	f=c+d+e	2,500,000
<b>Incurred During 2018</b>		
Direct material costs	g	1,900,000
Property acquired for resale	h	600,000
Pre-production section 471 costs	i=g+h	2,500,000
Production section 471 costs	j	7,500,000
Pre-production additional section 263A costs	k	200,000
Production additional section 263A costs	l	800,000
Total	m=i+j+k+l	11,000,000

Ending inventory	Reference	Amount
Direct material costs	n	800,000
Property acquired for resale	o	200,000
Pre-production section 471 costs	p=n+o	1,000,000
Production section 471 costs	q	2,000,000
Section 471 costs	r=p+q	3,000,000
Additional section 263A costs allocable to ending inventory	s=v+z	284,400
Total	t=r+s	3,284,400
<b>Modified Simplified Production Method</b>		
Pre-production additional section 263A costs	k	200,000
Pre-production section 471 costs	i	2,500,000
Pre-production absorption ratio	u=k/i	8.00%
Pre-production section 471 costs remaining on hand at year end	p	1,000,000
Pre-production additional section 263A costs allocable to ending inventory	v=u*p	80,000
Production additional section 263A costs	l	800,000
Residual pre-production additional section 263A costs	w=k-(u*p)	120,000
Production section 471 costs	j	7,500,000
Direct materials adjustment	x=a+g-n	1,500,000
Production absorption ratio	y=(1+w)/(j+x)	10.22%
Production section 471 costs remaining on hand at year end	q	2,000,000
Production additional section 263A costs allocable to ending inventory	z=y*q	204,400
<b>Summary</b>		
Pre-production additional section 263A costs allocable to ending inventory	v	80,000
Production additional section 263A costs allocable to ending inventory	z	204,400
Additional section 263A costs allocable to ending inventory	s	284,400
Section 471 costs	r	3,000,000
Total Ending Inventory	t	3,284,400

(B) *Example 2—FIFO inventory method with alternative method to determine amounts of section 471 costs.* (1) The facts are the same as in *Example 1* of paragraph (c)(3)(vi)(A) of this section, except that P uses the alternative method to determine amounts of section 471 costs by using its financial statement under § 1.263A-1(d)(2)(iii) rather than tax amounts under § 1.263A-1(d)(2)(i). In 2018, P's

production section 471 costs exclude \$40,000 of tax depreciation in excess of financial statement depreciation and include \$50,000 of financial statement direct labor in excess of tax direct labor. These are P's only differences in its book and tax amounts.

(2) Under § 1.263A-1(d)(2)(iii)(B), the positive \$40,000 depreciation adjustment and the negative \$50,000 direct labor adjustment must be included in

additional section 263A costs. Accordingly, P's production additional section 263A costs are \$790,000 (\$800,000 plus \$40,000 less \$50,000).

(3) P computes its production absorption ratio for 2018 under paragraph (c)(3)(ii)(D) of this section, as follows:

$$\frac{\text{(Production additional section 263A costs + Residual pre-production additional section 263A costs)}}{\text{(Production section 471 costs + Direct materials adjustment)}} = \frac{\text{(\$790,000 + 120,000)}}{\text{(\$7,500,000 + 1,500,000)}} = 10.11\%$$

(4) Under the modified simplified production method, P determines the additional section 263A costs allocable to its ending inventory under paragraph (c)(3)(i)(A) of this section by multiplying the pre-production absorption ratio by the pre-production section 471 costs remaining on hand at year end and the production absorption ratio by the production section 471 costs remaining on hand at year end, as follows:

$$\text{Additional section 263A costs} = (8.00\% \times \$1,000,000) + (10.11\% \times \$2,000,000) = \$282,200$$

(5) P adds this \$282,200 to the \$3,000,000 of section 471 costs remaining on hand at year end to calculate its total ending inventory of \$3,282,200. The balance of P's additional section 263A costs incurred during 2018, \$717,800 (\$1,000,000 less

\$282,200), is taken into account in 2018 as part of P's cost of goods sold.

(C) *Example 3—LIFO inventory method.* (1) The facts are the same as in *Example 1* of paragraph (c)(3)(vi)(A) of this section, except that P uses a dollar-value LIFO inventory method rather than the FIFO method. P's 2018 LIFO increment is \$1,500,000.

(2) Under paragraph (c)(3)(iv)(B)(1) of this section, to determine the additional section 263A costs allocable to its ending inventory, P multiplies the combined absorption ratio by the \$1,500,000 of LIFO increment. Under paragraph (c)(3)(iv)(B)(2) of this section, the combined absorption ratio is 9.48% (\$284,400 additional section 263A costs allocable to ending inventory, determined on a non-LIFO basis, divided by \$3,000,000 of section 471 costs on hand at year end, determined on a non-LIFO basis). Thus, P's additional section 263A costs allocable to its ending inventory are \$142,200 (\$1,500,000 multiplied by 9.48%). This \$142,200 is added to the \$1,500,000 to determine a total 2018 LIFO increment of \$1,642,200. The balance of P's additional section 263A costs incurred during 2018, \$857,800 (\$1,000,000 less \$142,200), is taken into account in 2018 as part of P's cost of goods sold.

(3) In 2019, P sells one-half of the inventory in its 2018 increment. P must include in its cost of goods sold for 2019 the amount of additional section 263A costs relating to this inventory, \$71,100 (one-half of the \$142,200 additional section 263A costs capitalized in 2018 ending inventory).

(D) *Example 4—Direct materials-based allocation of mixed service costs.* (1) Taxpayer R computes its capitalizable mixed service costs using the simplified service cost method described in § 1.263A-1(h). During 2018, R incurs \$200,000 of capitalizable mixed service costs, computed using the general allocation formula in § 1.263A-1(h). During 2018, R also incurs \$8,000,000 of total section 471 costs, including \$2,000,000 of direct material costs.

(2) Under paragraph (c)(3)(iii)(B) of this section, R determines its capitalizable mixed service costs allocable to pre-production additional section 263A costs based on the proportion of direct material costs in total section 471 costs. R's direct material costs are 25% of total section 471 costs (\$2,000,000 of direct material costs incurred during the year divided by \$8,000,000 of total section 471 costs incurred during the year). Thus, R allocates \$50,000 (25% x \$200,000) of mixed service costs to pre-production additional section 263A costs. R includes the remaining \$150,000 (\$200,000 less \$50,000) of capitalizable mixed service costs as production additional section 263A costs.

(E) *Example 5—Labor-based allocation of mixed service costs.* (1) Taxpayer S computes its capitaliz-

able mixed service costs using the simplified service cost method described in § 1.263A-1(h). During 2018, S incurs \$200,000 of capitalizable mixed service costs, computed using the general allocation formula in § 1.263A-1(h). During 2018, S also incurs \$10,000,000 of total labor costs (excluding any labor costs included in mixed service costs), including \$1,000,000 of labor costs that are pre-production costs as described in paragraph (a)(3)(ii) of this section (excluding any labor costs included in mixed service costs).

(2) Under paragraph (c)(3)(iii)(B) of this section, S determines its capitalizable mixed service costs allocable to pre-production additional section 263A costs based on the proportion of labor costs that are pre-production costs in labor costs. S's pre-production labor costs are 10% of labor costs (\$1,000,000 of labor costs incurred during the year that are pre-production costs (excluding any labor costs included in mixed service costs), divided by \$10,000,000 of total labor costs incurred during the year (excluding any labor costs included in mixed service costs). Thus, S allocates \$20,000 (10% x \$200,000) of mixed service costs to pre-production additional section 263A costs. S includes the remaining \$180,000 (\$200,000 less \$20,000) of capitalizable mixed service costs as production additional section 263A costs.

(F) *Example 6—De minimis rule for allocation of mixed service costs.* The facts are the same as in *Example 5* in paragraph (c)(3)(vi)(E) of this section, except that S uses the de minimis rule for mixed service costs in paragraph (c)(3)(iii)(C) of this section. Because 90% or more of S's capitalizable mixed service costs are allocated to production additional section 263A costs, under the de minimis rule, S allocates all \$200,000 of capitalizable mixed service costs to production additional section 263A costs. None of the capitalizable mixed service costs are allocated to pre-production additional section 263A costs.

(4) *Modified simplified production method with historic absorption ratio election—(i) In general.* This paragraph (c)(4) generally permits taxpayers using the modified simplified production method to elect a historic absorption ratio

in determining additional section 263A costs allocable to eligible property remaining on hand at the close of their taxable years. A taxpayer may only make a historic absorption ratio election under this paragraph (c)(4) if it has used the modified simplified production method for three or more consecutive taxable years immediately prior to the year of election and has capitalized additional section 263A costs using an actual pre-production absorption ratio, as defined in paragraph (c)(3)(ii)(B) of this section, and an actual production absorption ratio, as defined in paragraph (c)(3)(ii)(D) of this section, or an actual combined absorption ratio, as defined in paragraph (c)(3)(iv)(B)(2) of this section, for its three most recent consecutive taxable years. This method is not available to a taxpayer that is deemed to have zero additional section 263A costs under paragraph (c)(3)(v) of this section. The historic absorption ratio is used in lieu of the actual absorption ratios computed under paragraph (c)(3)(ii) of this section or the actual combined absorption ratio computed under paragraph (c)(3)(iv) and is based on costs capitalized by a taxpayer during its test period. If elected, the historic absorption ratio must be used for each taxable year within the qualifying period described in paragraph (b)(4)(ii)(C) of this section. Except as otherwise provided in this paragraph (c)(4), paragraph (b)(4) of this section applies to the historic absorption ratio election under the modified simplified production method.

(ii) *Operating rules and definitions—(A) Pre-production historic absorption ratio.* The pre-production historic absorption ratio is computed as follows:

Pre-production additional section 263A costs incurred during the test period  
Pre-production section 471 costs incurred during the test period

(1) Pre-production additional section 263A costs incurred during the test period are defined as the pre-production additional section 263A costs described in paragraph (c)(3)(ii)(B)(1) of this section that the taxpayer incurs during the test period

described in paragraph (b)(4)(ii)(B) of this section.

(2) Pre-production section 471 costs incurred during the test period are defined as the pre-production section 471 costs described in paragraph (c)(3)(ii)(B)(2) of

this section that the taxpayer incurs during the test period described in paragraph (b)(4)(ii)(B) of this section.

(B) *Production historic absorption ratio.* The production historic absorption ratio is computed as follows:

$$\begin{array}{r} \left( \begin{array}{l} \text{Production additional section 263A} \\ \text{costs incurred during the test period} \end{array} + \begin{array}{l} \text{Residual pre-production additional section} \\ \text{263A costs incurred during the test period} \end{array} \right) \\ \hline \left( \begin{array}{l} \text{Production section 471 costs incurred} \\ \text{during the test period} \end{array} + \begin{array}{l} \text{Direct materials adjustments made during the} \\ \text{test period} \end{array} \right) \end{array}$$



(1) Production additional section 263A costs incurred during the test period are defined as the production additional section 263A costs described in paragraph (c)(3)(ii)(D)(1) of this section that the taxpayer incurs during the test period described in paragraph (b)(4)(ii)(B) of this section.

(2) Residual pre-production additional section 263A costs incurred during the test period are defined as the residual pre-production additional section 263A costs described in paragraph (c)(3)(ii)(D)(2) of this section that the taxpayer incurs during the test period described in paragraph (b)(4)(ii)(B) of this section.

(3) Production section 471 costs incurred during the test period are defined as the production section 471 costs described in paragraph (c)(3)(ii)(D)(3) of this section that the taxpayer incurs during the test period described in paragraph (b)(4)(ii)(B) of this section.

(4) Direct materials adjustments made during the test period are defined as the direct materials adjustments described in paragraph (c)(3)(ii)(D)(4) of this section that the taxpayer incurs during the test period described in paragraph (b)(4)(ii)(B) of this section.

(iii) *LIFO taxpayers making the historic absorption ratio election—(A) In*

*general.* Instead of the pre-production and production historic absorption ratios defined in paragraph (c)(4)(ii) of this section, a LIFO taxpayer making the historic absorption ratio election under the modified simplified production method calculates a combined historic absorption ratio based on costs the taxpayer capitalizes during its test period.

(B) *Combined historic absorption ratio.* The combined historic absorption ratio is computed as follows:

Total allocable additional section 263A costs incurred during the test period  
Total section 471 costs remaining on hand at each year end of the test period

(1) *Total allocable additional section 263A costs incurred during the test period.* Total allocable additional section 263A costs incurred during the test period are the sum of the total additional section 263A costs allocable to eligible property on hand at year end as described in paragraph (c)(3)(i)(A) of this section, determined on a non-LIFO basis, for all taxable years in the test period.

(2) *Total section 471 costs remaining on hand at each year end of the test period.* Total section 471 costs remaining on hand at each year end of the test period are the sum of the total pre-production section 471 costs remaining on hand at year end as described in paragraph (c)(3)(ii)(C) of this section and the total production section 471 costs remaining on hand at year end as described in paragraph (c)(3)(ii)(E) of this section, determined on a non-LIFO basis, for all taxable years in the test period.

(iv) *Extension of qualifying period.* In the first taxable year following the close of each qualifying period (for example, the sixth taxable year following the test period), a taxpayer must compute the actual absorption ratios under paragraph (c)(3) of this section (pre-production and production absorption ratios or, for LIFO taxpayers, the combined absorption ratio). If the actual combined absorption ratio or both the actual pre-production and production absorption ratios, as applicable, computed for this taxable year (the recomputation year) is within one-half of one percentage point, plus or minus, of the corresponding historic absorption ratio or ratios used in determining capitalizable costs for the qualifying period (the previous five taxable years), the qualifying period is extended to include the recomputation year and the following five taxable years, and the taxpayer must continue to use the historic absorption ratio or ratios throughout the extended qualifying pe-

riod. If, however, the actual combined historic absorption ratio or either the actual pre-production absorption ratio or production absorption ratio, as applicable, is not within one-half of one percentage point, plus or minus, of the corresponding historic absorption ratio, the taxpayer must use the actual combined absorption ratio or ratios beginning with the recomputation year and throughout the updated test period. The taxpayer must resume using the historic absorption ratio or ratios based on the updated test period in the third taxable year following the recomputation year.

(v) *Examples.* The provisions of this paragraph (c)(4) are illustrated by the following examples:

(A) *Example 1—HAR and FIFO inventory method.* (1) Taxpayer S uses the FIFO method of accounting for inventories valued at cost and for 2021 elects to use the historic absorption ratio with the modified simplified production method. S identifies the following costs incurred during the test period:

	2018	2019	2020
Pre-production additional section 263A costs	\$100	\$200	\$300
Production additional section 263A costs	200	350	450
Pre-production section 471 costs	2,000	2,500	3,000
Production section 471 costs	2,500	3,500	4,000
Residual pre-production additional section 263A costs	60	136	220
Direct materials adjustments	2,700	3,200	3,700

(2) Under paragraph (c)(4)(ii)(A) of this section, S computes the pre-production historic absorption ratio as follows:

$$\frac{\text{Pre-production additional section 263A costs incurred during the test period}}{\text{Pre-production section 471 costs incurred during the test period}} = \frac{\$100 + 200 + 300}{\$2,000 + 2,500 + 3,000} = \frac{\$600}{\$7,500} = 8.00\%$$

(3) Under paragraph (c)(4)(ii)(B) of this section, S computes the production historic absorption ratio as follows:

$$\frac{\left( \begin{array}{l} \text{Production additional section 263A} \\ \text{costs incurred during the test period} \end{array} + \begin{array}{l} \text{Residual pre-production additional section} \\ \text{263A costs incurred during the test period} \end{array} \right)}{\left( \begin{array}{l} \text{Production section 471 costs incurred} \\ \text{during the test period} \end{array} + \begin{array}{l} \text{Direct materials adjustments made during the} \\ \text{test period} \end{array} \right)} = \frac{((\$200+350+450)+(60+136+220))}{((\$2,500+3,500+4,000)+(2,700+3,200+3,700))} = \frac{\$1,416}{\$19,600} = 7.22\%$$

(4) In 2021, S incurs \$10,000 of section 471 costs of which \$1,000 pre-production section 471 costs and \$2,000 production 471 costs remain in ending inventory. Under the modified simplified production method using a historic absorption ratio, S determines the pre-production additional section 263A costs allocable to its ending inventory by multiplying its pre-production historic absorption ratio (8.00%) by the pre-production section 471 costs remaining on hand at year end (\$1,000). Thus, S allocates \$80 of pre-production additional section 263A costs to its ending inventory (8.00% x \$1,000). S determines the production additional section 263A costs allocable to its ending inventory by multiplying

its production historic absorption ratio (7.22%) by the production section 471 costs remaining on hand at year end (\$2,000). Thus, S allocates \$144 of production additional section 263A costs to its ending inventory (7.22% x \$2,000).

(5) Under paragraph (c)(4)(i) of this section, S's total additional section 263A costs allocable to ending inventory in 2021 are \$224, which is the sum of the allocable pre-production additional section 263A costs (\$80) and the allocable production additional section 263A costs (\$144). S's ending inventory in 2021 is \$3,224, which is the sum of S's additional section 263A costs allocable to ending inventory and S's section 471 costs remaining in ending inventory

((\$224 + \$3,000). The balance of S's additional section 263A costs incurred during 2021 is taken into account in 2021 as part of S's cost of goods sold.

(B) *Example 2—HAR and LIFO inventory method.* (1)(i) The facts are the same as in *Example 1* in paragraph (c)(4)(v)(A) of this section, except that S uses a dollar-value LIFO inventory method rather than the FIFO method. S calculates additional section 263A costs incurred during the taxable year and allocable to ending inventory under paragraph (c)(4)(iii) of this section and identifies the following costs incurred during the test period:

	2018	2019	2020
Additional section 263A costs incurred during the taxable year allocable to ending inventory	\$90	\$137	\$167
Section 471 costs incurred during the taxable year that remain in ending inventory	1,000	1,400	2,100

(ii) In 2021, the LIFO value of S's increment is \$1,500.

(2) Under paragraph (c)(4)(iii) of this section, S computes a combined historic

absorption ratio as follows:

$$\frac{\text{Total allocable additional section 263A costs incurred during the test period}}{\text{Total section 471 costs remaining on hand at each year end of the test period}} = \frac{\$90 + 137 + 167}{\$1,000 + 1,400 + 2,100} = \frac{\$394}{\$4,500} = 8.76\%$$

(3) S's additional section 263A costs allocable to its 2021 LIFO increment are \$131 (\$1,500 beginning LIFO increment x 8.76% combined historic absorption ratio). S adds the \$131 to the \$1,500 LIFO increment to determine a total 2021 LIFO increment of \$1,631.

\* \* \* \* \*

(g) \* \* \*

(3) Paragraph (c) of this section applies for taxable years beginning on or after November 20, 2018. For any taxable year that both begins before November 20, 2018 and ends after November 20, 2018, the IRS will not challenge return positions consistent with all of paragraphs (c) of this section.

Par. 5. Section 1.263A-3 is amended by:

1. Revising paragraph (a)(4)(i).
2. Designating the text of paragraph (d)(4)(v) as paragraph (d)(4)(v)(A) and adding a paragraph heading.
3. Adding paragraph (d)(4)(v)(B).

The revision and additions read as follows:

§ 1.263A-3 Rules relating to property acquired for resale.

- (a) \* \* \*
(4) \* \* \*

(i) In general. Except as provided in paragraphs (a)(4)(ii) and (iii) of this section, a taxpayer may elect the simplified production method, as described in § 1.263A-2(b), or the modified simplified production method, as described in § 1.263A-2(c), but may not elect the simplified resale method, as described in paragraph (d) of this section, if the taxpayer is engaged in both production and resale activities with respect to the items of eligible property listed in § 1.263A-2(b)(2).

- \* \* \* \* \*
(d) \* \* \*
(4) \* \* \*
(v) \* \* \*

(A) Transition to elect historic absorption ratio. \* \* \*

(B) Transition to revoke historic absorption ratio. Notwithstanding the requirements provided in paragraph (d)(4)(iii)(B) of this section regarding revocations of the historic absorption ratio during a qualifying period, a taxpayer will be permitted to revoke the historic absorption ratio in their first, second, or third taxable year ending on or after November 20,

2018, under such administrative procedures and with terms and conditions prescribed by the Commissioner.

\* \* \* \* \*

Par. 6. In § 1.263A-7, paragraph (b)(2)(iii)(A)(2)(ii) is revised to read as follows:

§ 1.263A-7 Changing a method of accounting under section 263A.

- \* \* \* \* \*
(b) \* \* \*
(2) \* \* \*
(iii) \* \* \*
(A) \* \* \*
(2) \* \* \*

(ii) Simplified method used. A dollar-value LIFO taxpayer using the 3-year average method and the simplified production method, the modified simplified production method, or the simplified resale method to revalue its inventory is permitted, but not required, to establish a new base year.

\* \* \* \* \*

Par. 7. In § 1.471-3, paragraph (b) is revised to read as follows:

§ 1.471-3 Inventories at cost.

\* \* \* \* \*

(b) In the case of merchandise purchased since the beginning of the taxable year, the invoice price less trade or other discounts, except strictly cash discounts

approximating a fair interest rate, which may be deducted or not at the option of the taxpayer, provided a consistent course is followed. To this net invoice price should be added transportation or other necessary charges incurred in acquiring possession of the goods. But see § 1.263A-1(d)(2)(iv)(C) for special rules for certain direct material costs that in certain cases are permitted to be capitalized as additional section 263A costs by taxpayers using a simplified method under § 1.263A-2(b) or (c) or § 1.263A-3(d). For taxpayers acquiring merchandise for resale that are subject to the provisions of section 263A, see §§ 1.263A-1 and 1.263A-3 for additional amounts that must be included in inventory costs.

\* \* \* \* \*

Kirsten Wielobob,
Deputy Commissioner for Services and Enforcement.

Approved: July 23, 2018.

David J. Kautter,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on November 19, 2018, 8:45 p.m., and published in the issue of the Federal Register for November 20, 2018, 83 F.R. 58476)



# Part III. Administrative, Procedural, and Miscellaneous

## Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

### Notice 2018–86

This notice provides guidance on the corporate bond monthly yield curve, the corresponding spot segment rates used under § 417(e)(3), and the 24-month average segment rates under § 430(h)(2) of the Internal Revenue Code. In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008 and the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I).

#### YIELD CURVE AND SEGMENT RATES

Section 430 specifies the minimum funding requirements that apply to single-employer plans (except for CSEC plans under § 414(y)) pursuant to § 412. Section

430(h)(2) specifies the interest rates that must be used to determine a plan’s target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates (“segment rates”), each of which applies to cash flows during specified periods. To the extent provided under § 430(h)(2)(C)(iv), these segment rates are adjusted by the applicable percentage of the 25-year average segment rates for the period ending September 30 of the year preceding the calendar year in which the plan year begins.<sup>208</sup> However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates.

Notice 2007–81, 2007–44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, and the 24-month average corporate bond segment rates used to compute the target normal cost and the funding target. Consistent with the methodology specified in Notice 2007–81, the monthly corporate bond yield curve derived from October 2018 data is in Table 2018-10 at the end

of this notice. The spot first, second, and third segment rates for the month of October 2018 are, respectively, 3.33, 4.39, and 4.72.

The 24-month average segment rates determined under § 430(h)(2)(C)(i) through (iii) must be adjusted pursuant to § 430(h)(2)(C)(iv) to be within the applicable minimum and maximum percentages of the corresponding 25-year average segment rates. For plan years beginning before 2021, the applicable minimum percentage is 90% and the applicable maximum percentage is 110%. The 25-year average segment rates for plan years beginning in 2017, 2018, and 2019 were published in Notice 2016–54, 2016–40 I.R.B. 429, Notice 2017–50, 2017–41 I.R.B. 280, and Notice 2018–73, 2018–40 I.R.B. 526, respectively.

#### 24-MONTH AVERAGE CORPORATE BOND SEGMENT RATES

The three 24-month average corporate bond segment rates applicable for November 2018 without adjustment for the 25-year average segment rate limits are as follows:

Applicable Month	24-Month Average Segment Rates Without 25-Year Average Adjustment		
	First Segment	Second Segment	Third Segment
November 2018	2.43	3.89	4.49

Based on § 430(h)(2)(C)(iv), the 24-month averages applicable for November 2018, adjusted to be within the applicable minimum and maximum percentages of the corresponding 25-year average segment rates, are as follows:

For Plan Years Beginning In	Adjusted 24-Month Average Segment Rates			
	Applicable Month	First Segment	Second Segment	Third Segment
2017	November 2018	4.16	5.72	6.48
2018	November 2018	3.92	5.52	6.29
2019	November 2018	3.74	5.35	6.11

#### 30-YEAR TREASURY SECURITIES INTEREST RATES

Section 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in

§ 431(c)(6)(A), based on the plan’s current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on

the last day before the beginning of the plan year. Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate. The rate of interest on 30-year Treasury securities for October 2018 is 3.34 percent. The Service determined this rate as the average of the daily determinations of yield on the 30-year

<sup>208</sup>Pursuant to § 433(h)(3)(A), the 3<sup>rd</sup> segment rate determined under § 430(h)(2)(C) is used to determine the current liability of a CSEC plan (which is used to calculate the minimum amount of the full funding limitation under § 433(c)(7)(C)).

Treasury bond maturing in August 2048. For plan years beginning in November 2018, the weighted average of the rates of interest on 30-year Treasury securities and the permissible range of rates used to calculate current liability are as follows:

<b>For Plan Years Beginning In</b>	<i>Treasury Weighted Average Rates</i>		<b>Permissible Range</b> <b>90% to 105%</b>
	<b>30-Year Treasury Weighted Average</b>		
November 2018	2.90		2.61 to 3.04

**MINIMUM PRESENT VALUE SEGMENT RATES** computed without regard to a 24-month average. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value segment rates determined for October 2018 are as follows:

In general, the applicable interest rates under § 417(e)(3)(D) are segment rates

computed without regard to a 24-month average. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value seg-

ment rates determined for October 2018 are as follows:

<b>Month</b>	<i>Minimum Present Value Segment Rates</i>		
	<b>First Segment</b>	<b>Second Segment</b>	<b>Third Segment</b>
October 2018	3.33	4.39	4.72

**DRAFTING INFORMATION**

The principal author of this notice is Tom Morgan of the Office of the Associ-

ate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS participated in the development of this guidance. For further

information regarding this notice, contact Mr. Morgan at 202-317-6700 or Paul Stern at 202-317-8702 (not toll-free numbers).

**Table 2018–10**  
 Monthly Yield Curve for October 2018  
 Derived from October 2018 Data

<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>	<i>Maturity</i>	<i>Yield</i>
0.5	2.74	20.5	4.67	40.5	4.73	60.5	4.75	80.5	4.76
1.0	2.95	21.0	4.67	41.0	4.73	61.0	4.75	81.0	4.76
1.5	3.13	21.5	4.67	41.5	4.73	61.5	4.75	81.5	4.76
2.0	3.28	22.0	4.67	42.0	4.73	62.0	4.75	82.0	4.76
2.5	3.38	22.5	4.67	42.5	4.73	62.5	4.75	82.5	4.76
3.0	3.45	23.0	4.68	43.0	4.73	63.0	4.75	83.0	4.76
3.5	3.51	23.5	4.68	43.5	4.73	63.5	4.75	83.5	4.77
4.0	3.57	24.0	4.68	44.0	4.73	64.0	4.75	84.0	4.77
4.5	3.62	24.5	4.68	44.5	4.73	64.5	4.75	84.5	4.77
5.0	3.68	25.0	4.68	45.0	4.73	65.0	4.75	85.0	4.77
5.5	3.74	25.5	4.68	45.5	4.73	65.5	4.76	85.5	4.77
6.0	3.8	26.0	4.69	46.0	4.74	66.0	4.76	86.0	4.77
6.5	3.87	26.5	4.69	46.5	4.74	66.5	4.76	86.5	4.77
7.0	3.94	27.0	4.69	47.0	4.74	67.0	4.76	87.0	4.77
7.5	4.01	27.5	4.69	47.5	4.74	67.5	4.76	87.5	4.77
8.0	4.07	28.0	4.69	48.0	4.74	68.0	4.76	88.0	4.77
8.5	4.14	28.5	4.69	48.5	4.74	68.5	4.76	88.5	4.77
9.0	4.2	29.0	4.7	49.0	4.74	69.0	4.76	89.0	4.77
9.5	4.25	29.5	4.7	49.5	4.74	69.5	4.76	89.5	4.77
10.0	4.3	30.0	4.7	50.0	4.74	70.0	4.76	90.0	4.77
10.5	4.35	30.5	4.7	50.5	4.74	70.5	4.76	90.5	4.77
11.0	4.39	31.0	4.7	51.0	4.74	71.0	4.76	91.0	4.77
11.5	4.43	31.5	4.7	51.5	4.74	71.5	4.76	91.5	4.77
12.0	4.47	32.0	4.71	52.0	4.74	72.0	4.76	92.0	4.77
12.5	4.5	32.5	4.71	52.5	4.74	72.5	4.76	92.5	4.77
13.0	4.52	33.0	4.71	53.0	4.74	73.0	4.76	93.0	4.77
13.5	4.55	33.5	4.71	53.5	4.74	73.5	4.76	93.5	4.77
14.0	4.57	34.0	4.71	54.0	4.75	74.0	4.76	94.0	4.77
14.5	4.58	34.5	4.71	54.5	4.75	74.5	4.76	94.5	4.77
15.0	4.6	35.0	4.71	55.0	4.75	75.0	4.76	95.0	4.77
15.5	4.61	35.5	4.72	55.5	4.75	75.5	4.76	95.5	4.77
16.0	4.62	36.0	4.72	56.0	4.75	76.0	4.76	96.0	4.77
16.5	4.63	36.5	4.72	56.5	4.75	76.5	4.76	96.5	4.77
17.0	4.64	37.0	4.72	57.0	4.75	77.0	4.76	97.0	4.77
17.5	4.64	37.5	4.72	57.5	4.75	77.5	4.76	97.5	4.77
18.0	4.65	38.0	4.72	58.0	4.75	78.0	4.76	98.0	4.77
18.5	4.65	38.5	4.72	58.5	4.75	78.5	4.76	98.5	4.77
19.0	4.66	39.0	4.72	59.0	4.75	79.0	4.76	99.0	4.77
19.5	4.66	39.5	4.72	59.5	4.75	79.5	4.76	99.5	4.77
20.0	4.66	40.0	4.73	60.0	4.75	80.0	4.76	100.0	4.77



# 2018 Required Amendments List for Qualified Retirement Plans

## Notice 2018-91

### I. PURPOSE

This notice contains the Required Amendments List for 2018 (2018 RA List). Section 5 of Rev. Proc. 2016-37, 2016-29 I.R.B. 136, provides that, in the case of an individually designed plan, the remedial amendment period for a disqualifying provision arising as a result of a change in qualification requirements generally is extended to the end of the second calendar year that begins after the issuance of the Required Amendments List (RA List) in which the change in qualification requirements appears. There are no entries listing changes in qualification requirements on the 2018 RA List.

### II. BACKGROUND

Section 401(b) of the Internal Revenue Code (Code) provides a remedial amendment period during which a plan may be amended retroactively to comply with the qualification requirements under § 401(a). Section 1.401(b)-1 describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. Those regulations also grant the Commissioner the discretion to designate certain plan provisions as disqualifying provisions and to extend the remedial amendment period.

Sections 5.05(3) and 5.06(3) of Rev. Proc. 2016-37 extend the remedial amendment period for individually designed plans to correct disqualifying provisions that arise as a result of a change in qualification requirements. Under section 5.05(3), the remedial amendment period for a plan that is not a governmental plan (as defined in § 414(d)) is extended to the end of the second calendar year that begins after the issuance of the RA List on which the change in qualification requirements appears. Section 5.06(3) provides a

special rule for governmental plans that could further extend the remedial amendment period in some cases.

Section 8.01 of Rev. Proc. 2016-37 provides that the plan amendment deadline with respect to a disqualifying provision described in section 5 of Rev. Proc. 2016-37 is the date on which the remedial amendment period ends with respect to that disqualifying provision.

Section 9 of Rev. Proc. 2016-37 provides that the Department of the Treasury (the Treasury Department) and the Internal Revenue Service (IRS) intend to publish an RA List annually. In general, a change in qualification requirements will not appear on an RA List until guidance with respect to that change (including, in certain cases, model amendments) has been provided in regulations or in other guidance published in the Internal Revenue Bulletin. However, in the discretion of the Treasury Department and the IRS, a change in qualification requirements may be included on an RA List in other circumstances, such as in cases in which a statutory change is enacted and the Treasury Department and the IRS anticipate that no guidance will be issued.

### III. CONTENT OF RA LIST

In general, an RA List includes statutory and administrative changes in qualification requirements that are first effective during the plan year in which the list is published.<sup>209</sup> However, an RA List does not include guidance issued or legislation enacted after the list has been prepared and also does not include:

- Statutory changes in qualification requirements for which the Treasury Department and the IRS expect to issue guidance (which would be included on an RA List issued in a future year);
- Changes in qualification requirements that permit (but do not require) optional plan provisions (in contrast to changes in the qualification requirements that cause existing plan provisions, which may include optional plan provisions previously adopted, to

become disqualifying provisions);<sup>210</sup> or

- Changes in the tax laws affecting qualified plans that do not change the qualification requirements under § 401(a) (such as changes to the tax treatment of plan distributions, or changes to the funding requirements for qualified plans).

Annual, monthly, or other periodic changes to (1) the various dollar limits that are adjusted for cost of living increases as provided in § 415(d) or other Code provisions, (2) the spot segment rates used to determine the applicable interest rate under § 417(e)(3), and (3) the applicable mortality table under § 417(e)(3), are treated as included on the RA List for the year in which such changes are effective even though they are not directly referenced on that RA List. The Treasury Department and the IRS anticipate that few plans have language that will need to be amended on account of these changes.

### IV. 2018 REQUIRED AMENDMENTS LIST

There are no entries listing changes in qualification requirements on the 2018 RA List.

### V. DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Carrington at (202) 317-4148 (not a toll-free number).

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*26 CFR 601.204: Changes in accounting periods and in methods of accounting. (Also Part I, §§ 263A, 471; 1.263A-1, 1.263A-2, 1.263A-3, 1.471-3.)*

## Rev. Proc. 2018-56

### SECTION 1. PURPOSE

This revenue procedure provides the procedures by which a taxpayer may obtain the automatic consent of the Commissioner of Internal Revenue (Commis-

<sup>209</sup>RA Lists also may include changes in qualification requirements that were first effective in a prior year that were not included on a prior RA List under certain circumstances, such as changes in qualification requirements that were issued or enacted after the prior year's RA List was prepared.

<sup>210</sup>The remedial amendment period and plan amendment deadline for discretionary changes to the terms of a plan are governed by sections 5.05(2), 5.06(2), and 8.02 of Rev. Proc. 2016-37, and are not affected by the inclusion of a change in qualification requirements on an RA List.

sioner) to change to certain methods of accounting provided in §§ 1.263A-1, -2, and -3 of the Income Tax Regulations for costs allocable to certain property produced or acquired for resale by the taxpayer. This revenue procedure modifies Rev. Proc. 2018-31, 2018-22 I.R.B. 637.

## SECTION 2. BACKGROUND

.01 Concurrently with the release of this revenue procedure, the Department of Treasury (Treasury Department) and the Internal Revenue Service (Service) are issuing final regulations amending §§ 1.263A-1, -2, and -3 (T.D. 9843) (the final regulations). The final regulations are intended to reduce distortions, compliance costs, burden, and administrative complexity under § 263A of the Internal Revenue Code (Code) by (1) providing rules for the treatment of negative adjustments related to certain costs required to be capitalized to property produced or acquired for resale; (2) providing a new simplified method of accounting, the modified simplified production method, for determining the additional section 263A costs that must be capitalized to ending inventory or other property on hand at the end of the year; and (3) redefining how certain types of costs are categorized for purposes of the simplified methods for determining the additional section 263A costs that must be capitalized to ending inventory or other property on hand at the end of the year.

.02 Sections 1.263A-2(b), 1.263A-2(c), and 1.263A-3(d) provide the simplified production method, the modified simplified production method, and the simplified resale method, respectively, which are the simplified methods for determining the additional section 263A costs that must be capitalized to ending inventory (or to the current-year increment in the case of a taxpayer using the last-in, first-out (LIFO) inventory method) or other property on hand at the end of the year. Under the simplified production method and the simplified resale method, a taxpayer determines the additional section 263A costs (as defined in § 1.263A-1(d)(3)) that must be capitalized to ending inventory or other property on hand at the end of the year by multiplying the section 471 costs (as defined in § 1.263A-1(d)(2)) remaining on hand at year end (or reflected in the current-year increment in the case of a taxpayer using the LIFO inventory method) by an absorption ratio. In general, these absorption

ratios are total additional section 263A costs incurred during the taxable year divided by total section 471 costs incurred during the taxable year. Under the modified simplified production method, a taxpayer determines the additional section 263A costs that must be capitalized to ending inventory or other property on hand at the end of the year by adding the results of (1) the pre-production section 471 costs remaining on hand at year end multiplied by a pre-production absorption ratio, and (2) the production section 471 costs remaining on hand at year end multiplied by a production absorption ratio.

.03 Sections 1.263A-2(b)(4), 1.263A-2(c)(4), and 1.263A-3(d)(4) permit a taxpayer changing to or using the simplified production method, the modified simplified production method, or the simplified resale method, respectively, to elect to use a historic absorption ratio in lieu of an actual absorption ratio. However, a taxpayer may make a historic absorption ratio election only if it has used the simplified production method, the modified simplified production method, or the simplified resale method for each of the three preceding taxable years.

.04 Sections 1.263A-2(b)(4)(v)(B) and 1.263A-3(d)(4)(v)(B) provide transition rules for a taxpayer that has elected to use the simplified production method with a historic absorption ratio election or the simplified resale method with a historic absorption ratio election, respectively, to revoke its historic absorption ratio election in its first, second, or third taxable year ending on or after November 20, 2018, under such terms and conditions as may be prescribed by the Commissioner.

.05 Except as otherwise expressly provided by the Code or the regulations thereunder, § 446(e) and § 1.446-1(e)(2) require a taxpayer to secure the consent of the Commissioner before changing a method of accounting for federal income tax purposes. Section 1.446-1(e)(3)(ii) authorizes the Commissioner to prescribe administrative procedures setting forth the terms and conditions necessary for a taxpayer to obtain consent to a change in method of accounting. Revenue Procedure 2015-13, 2015-5 I.R.B. 419, as clarified and modified by Rev. Proc. 2015-33, 2015-24 I.R.B. 1067, as modified by Rev. Proc. 2016-1, 2016-1 I.R.B. 1, and as modified by Rev. Proc. 2017-59,

2017-48 I.R.B. 543, provides the general procedures by which a taxpayer may obtain automatic consent of the Commissioner to a change in method of accounting described in Rev. Proc. 2018-31.

.06 Section 12.01 of Rev. Proc. 2018-31 provides certain automatic changes for a reseller or reseller-producer, such as a change to a “UNICAP method specifically described in the regulations.” See section 12.01(3)(g) of Rev. Proc. 2018-31.

.07 Section 12.02 of Rev. Proc. 2018-31 provides certain automatic changes for a producer or reseller-producer, such as a change to a “UNICAP method specifically described in the regulations.” See section 12.02(2) of Rev. Proc. 2018-31.

.08 This revenue procedure modifies Rev. Proc. 2018-31 to provide additional automatic method changes under § 1.263A-1, -2, and -3 to assist taxpayers in complying with the final regulations. For example, sections 12.01 and 12.02 of Rev. Proc. 2018-31 are modified to expand the methods of accounting that are included in the list of UNICAP methods specifically described in the regulations and to temporarily permit automatic changes in methods of accounting for certain taxpayers changing from a simplified method with a historic absorption ratio election to a different simplified method without a historic absorption ratio election, a specific identification method, a burden rate method, or a standard cost method. In addition, Rev. Proc. 2018-31 is modified to add new section 12.17, which provides an automatic change in method of accounting for taxpayers using a simplified method or changing to a simplified method to recharacterize costs in accordance with the characterization requirements of § 1.263A-1(d)(2) and (d)(3), and a new section 12.18, which temporarily permits taxpayers to make an automatic change in method of accounting to revoke a taxpayer’s historic absorption ratio election.

## SECTION 3. CHANGES IN METHOD OF ACCOUNTING

.01 *In general.* A taxpayer that wants to change to one or more of the methods described in this revenue procedure must, if eligible, use the automatic change procedures in Rev. Proc. 2015-13 and Rev.

Proc. 2018–31 (or successors), as modified by this revenue procedure.

.02 *Modifications to existing automatic changes in Rev. Proc. 2018–31.*

(1) Sections 12.01(1)(b)(i)-(iv) of Rev. Proc. 2018–31 are modified to read as follows:

(b) *Inapplicability.*

(i) *Self constructed assets.* This change does not apply to a taxpayer that wants to use either the simplified service cost method, the simplified production method, or the modified simplified production method for self-constructed assets under §§ 1.263A–1(h)(2)(i)(D), 1.263A–2(b)(2)(i)(D), and 1.263A–2(c)(2), respectively.

(ii) *Historic absorption ratio.*

(A) *In general.* This change does not apply to a taxpayer that (1) wants to make a historic absorption ratio election with the simplified production method, the modified simplified production method, or the simplified resale method under §§ 1.263A–2(b)(4), 1.263A–2(c)(4), or 1.263A–3(d)(4), respectively; (2) wants to revoke an election to use a historic absorption ratio with the simplified production method, the modified simplified production method, or the simplified resale method (see §§ 1.263A–2(b)(4)(iii)(B), 1.263A–2(c)(4), or 1.263A–3(d)(4)(iii)(B), respectively); or (3) uses a historic absorption ratio election with the simplified production method, the modified simplified production method, or the simplified resale method and wants to change to a different method for determining the additional section 263A costs that must be capitalized to ending inventories or other eligible property on hand at the end of the taxable year (that is, to a different simplified method or a facts-and-circumstances method). However, this change applies to a small reseller that wants to change from the simplified resale method with a historic absorption ratio election to a permissible non-UNICAP inventory capitalization method under section 12.01(1)(a)(i) of this revenue procedure.

(B) *Transition rule.* Notwithstanding the inapplicability rule in section 12.01(1)(b)(ii)(A) of this revenue procedure, for the taxpayer’s first, second, or third taxable year ending on or after November 20, 2018, this change applies to:

(1) a reseller or reseller-producer that is using a historic absorption ratio election with the simplified resale method that wants to change to the simplified produc-

tion method without a historic absorption ratio election, the modified simplified production method without a historic absorption ratio election, a specific identification method under § 1.263A–1(f)(2), or a burden rate or standard cost method under § 1.263A–1(f)(3); or

(2) a reseller or reseller-producer that is using a historic absorption ratio election with the simplified production method that wants to change to the simplified resale method without a historic absorption ratio election, the modified simplified production method without a historic absorption ratio election, a specific identification method under § 1.263A–1(f)(2), or a burden rate or standard cost method under § 1.263A–1(f)(3).

(iii) *Interest capitalization.* This change does not apply to a change in method of accounting for interest capitalization (but see section 12.14 of this revenue procedure).

(iv) *Recharacterizing costs under the simplified resale method, simplified production method, or modified simplified production method.* This change does not include a change to recharacterize section 471 costs, as defined in § 1.263A–1(d)(2), as additional section 263A costs, as defined in § 1.263A–1(d)(3) (or *vice versa*) for a taxpayer that uses or is changing to the simplified resale method, the simplified production method, or the modified simplified production method. See section 12.17 for certain changes to recharacterize section 471 costs as additional section 263A costs (or *vice versa*).

(2) Section 12.01(2) of Rev. Proc. 2018–31 is modified to read as follows:

(2) *Eligibility rules.*

(a) *Certain eligibility rules inapplicable.* The eligibility rule in section 5.01(1)(f) of Rev. Proc. 2015–13, 2015–5 I.R.B. 419, does not apply to the changes described in section 12.01(1)(a)(i) and (ii) of this revenue procedure.

(b) *Certain eligibility rules temporarily inapplicable.* The eligibility rule in section 5.01(1)(f) of Rev. Proc. 2015–13 does not apply to a taxpayer that wants to make one or more changes in method of accounting under section 12.01 of this revenue procedure for the taxpayer’s first, second, or third taxable year ending on or after November 20, 2018.

(3) Section 12.01(3)(g) of Rev. Proc. 2018–31 is modified to read as follows:

(g) “A UNICAP method specifically described in the regulations” does not include any other reasonable allocation method within the meaning of § 1.263A–1(f)(4). However, a “UNICAP method specifically described in the regulations” includes:

(i) the 90-10 de minimis rule to allocate a mixed service department’s costs to resale activities (§ 1.263A–1(g)(4)(ii));

(ii) the 1/3 - 2/3 rule to allocate labor costs of personnel to purchasing activities (§ 1.263A–3(c)(3)(ii)(A));

(iii) the 90-10 de minimis rule to allocate a dual-function storage facility’s costs to property acquired for resale (§ 1.263A–3(c)(5)(iii)(C));

(iv) the specific identification method (§ 1.263A–1(f)(2));

(v) the burden rate method (§ 1.263A–1(f)(3)(i));

(vi) the standard cost method (§ 1.263A–1(f)(3)(ii));

(vii) the direct reallocation method (§ 1.263A–1(g)(4)(iii)(A));

(viii) the step-allocation method (§ 1.263A–1(g)(4)(iii)(B));

(ix) the simplified service cost method (§ 1.263A–1(h)) (with either a labor-based allocation ratio or a production cost allocation ratio);

(x) the simplified resale method without a historic absorption ratio election (§ 1.263A–3(d));

(xi) the alternative method to determine amounts of section 471 costs by using a taxpayer’s financial statement (§ 1.263A–1(d)(2)(iii));

(xii) the method to determine amounts of section 471 costs by using the amounts incurred in the taxable year for federal income tax purposes (§ 1.263A–1(d)(2)(i));

(xiii) the safe harbor method for certain variances and under or over-applied burdens (§ 1.263A–1(d)(2)(v));

(xiv) the removal of one or more costs from section 471 costs as required in § 1.263A–1(d)(2)(vi);

(xv) the removal of one or more costs from section 471 costs using negative adjustments to additional section 263A costs as permitted in § 1.263A–1(d)(3)(ii)(B);

(xvi) the de minimis rule for certain direct labor costs (§ 1.263A–1(d)(2)(iv)(B));

(xvii) the de minimis rule for certain direct material costs (§ 1.263A–1(d)(2)(iv)(C));



(xviii) the simplified production method without a historic absorption ratio election (§ 1.263A-2(b));

(xix) the modified simplified production method without a historic absorption ratio election (§ 1.263A-2(c));

(xx) the direct material costs or pre-production labor costs allocation methods for capitalizable mixed service costs under the modified simplified production method (§ 1.263A-2(c)(3)(iii)(B)); and

(xxi) the 90-10 de minimis rule to allocate capitalizable mixed service costs under the modified simplified production method (§ 1.263A-2(c)(3)(iii)(C)).

(4) Section 12.02(1)(b) of Rev. Proc. 2018-31 is modified as follows:

(b) *Inapplicability.*

(i) *Self constructed assets.* This change does not apply to a taxpayer that wants to use either the simplified service cost method, the simplified production method, or the modified simplified production method for self-constructed assets under §§ 1.263A-1(h)(2)(i)(D), 1.263A-2(b)(2)(i)(D), and 1.263A-2(c)(2), respectively.

(ii) *Historic absorption ratio.*

(A) *In general.* This change does not apply to a taxpayer that (1) wants to make a historic absorption ratio election with the simplified production method or the modified simplified production method under §§ 1.263A-2(b)(4) or 1.263A-2(c)(4), respectively; (2) wants to revoke an election to use a historic absorption ratio with the simplified production method or the modified simplified production method (see §§ 1.263A-2(b)(4)(iii)(B) or 1.263A-2(c)(4), respectively); or (3) uses a historic absorption ratio election with the simplified production method or the modified simplified production method and wants to change to a different method for determining the additional section 263A costs that must be capitalized to ending inventories or other eligible property on hand at the end of the taxable year (that is, to a different simplified method or a facts-and-circumstances method).

(B) *Transition rule.* Notwithstanding the inapplicability rule in section 12.02(1)(b)(ii)(A) of this revenue procedure, for the taxpayer's first, second, or third taxable year ending on or after November 20, 2018, this change applies to a taxpayer that is using the simplified production method with a historic absorption

ratio election that wants to change to the modified simplified production method without a historic absorption ratio election, a specific identification method under § 1.263A-1(f)(2), or a burden rate or standard cost method under § 1.263A-1(f)(3).

(iii) *Interest capitalization.* This change does not apply to a change in method of accounting for interest capitalization (but see section 12.14 of this revenue procedure).

(iv) *Recharacterizing costs under the simplified production method or modified simplified production method.* This change does not include a change to recharacterize section 471 costs, as defined in § 1.263A-1(d)(2), as additional section 263A costs, as defined in § 1.263A-1(d)(3), (or *vice versa*) for a taxpayer that uses or is changing to the simplified production method or the modified simplified production method. See section 12.17 for certain changes to recharacterize section 471 costs as additional section 263A costs (or *vice versa*).

(v) *Reseller-producer using the simplified resale method.* This change does not apply to a reseller-producer that uses or is changing to the simplified resale method under § 1.263A-3(d) (but see section 12.01(1) of this revenue procedure for certain changes that may be made by a reseller-producer).

(5) Section 12.02(2) of Rev. Proc. 2018-31 is modified to read as follows:

(2) *Definition.* A "UNICAP method specifically described in the regulations" does not include the simplified resale method under § 1.263A-3(d)(4) or any other reasonable allocation method within the meaning of § 1.263A-1(f)(4). However, a "UNICAP method specifically described in the regulations" includes:

(a) the 90-10 de minimis rule to allocate a mixed service department's costs to production or resale activities (§ 1.263A-1(g)(4)(ii));

(b) the 1/3 - 2/3 rule to allocate labor costs of personnel to purchasing activities (§ 1.263A-3(c)(3)(ii)(A));

(c) the 90-10 de minimis rule to allocate a dual-function storage facility's costs to property acquired for resale (§ 1.263A-3(c)(5)(iii)(C));

(d) the specific identification method (§ 1.263A-1(f)(2));

(e) the burden rate method (§ 1.263A-1(f)(3)(i));

(f) the standard cost method (§ 1.263A-1(f)(3)(ii));

(g) the direct reallocation method (§ 1.263A-1(g)(4)(iii)(A));

(h) the step-allocation method (§ 1.263A-1(g)(4)(iii)(B));

(i) the simplified service cost method (§ 1.263A-1(h)) (with either a labor-based allocation ratio or a production cost allocation ratio);

(j) the simplified production method without a historic absorption ratio election (§ 1.263A-2(b));

(k) the alternative method to determine amounts of section 471 costs by using a taxpayer's financial statement (§ 1.263A-1(d)(2)(iii));

(l) the method to determine amounts of section 471 costs by using the amounts incurred in the taxable year for federal income tax purposes (§ 1.263A-1(d)(2)(i));

(m) the safe harbor method for certain variances and under or over-applied burdens (§ 1.263A-1(d)(2)(v));

(n) the removal of one or more costs from section 471 costs as required in § 1.263A-1(d)(2)(vi);

(o) the removal of one or more costs from section 471 costs using negative adjustments to additional section 263A costs as permitted in § 1.263A-1(d)(3)(ii)(B);

(p) the de minimis rule for certain direct labor costs (§ 1.263A-1(d)(2)(iv)(B));

(q) the de minimis rule for certain direct material costs (§ 1.263A-1(d)(2)(iv)(C));

(r) the modified simplified production method without a historic absorption ratio election (§ 1.263A-2(c)(3));

(s) the direct material costs or pre-production labor costs allocation methods for capitalizable mixed service costs under the modified simplified production method (§ 1.263A-2(c)(3)(iii)(B)); and

(t) the 90-10 de minimis rule to allocate capitalizable mixed service costs under the modified simplified production method (§ 1.263A-2(c)(3)(iii)(C)).

(6) Section 12.02 of Rev. Proc. 2018-31 is modified to add new section 12.02(4) to read as follows, and renumber existing sections 12.02(4) and 12.02(5) as sections 12.02(5) and 12.02(6), respectively:

(4) *Eligibility rule temporarily inapplicable.* The eligibility rule in section

5.01(1)(f) of Rev. Proc. 2015–13 does not apply to a taxpayer that wants to make one or more changes in method of accounting under section 12.02 of this revenue procedure for the taxpayer’s first, second, or third taxable year ending on or after November 20, 2018.

.03 *New automatic changes in Rev. Proc. 2018–31.*

(1) Section 12 of Rev. Proc. 2018–31 is modified to add new section 12.17 to read as follows:

.17 *Recharacterizing costs under the simplified resale method, simplified production method, or the modified simplified production method.*

(1) *Description of change.*

(a) *Applicability.* This change applies to a taxpayer that uses or is changing to the simplified production method, the modified simplified production method, or the simplified resale method under §§ 1.263A–2(b), 1.263A–2(c), and 1.263A–3(d), respectively, and that wants to recharacterize a section 471 cost, as defined in § 1.263A–1(d)(2), as an additional section 263A cost, as defined in § 1.263A–1(d)(3), or *vice versa*, in accordance with the characterization requirements of § 1.263A–1(d)(2) and (d)(3). For example, this change applies to a taxpayer using the modified simplified production method that treats a direct cost of property produced or property acquired for resale as an additional section 263A cost and that wants to change to characterize the direct cost as a section 471 cost, as required by § 1.263A–1(d)(2)(ii).

(b) *Inapplicability.* This change does not apply to a change in method of accounting that is described in another section of this revenue procedure or in other guidance published in the IRB. For example, this change does not apply to a taxpayer that wants to make a change described in section 12.01 or 12.02 of this revenue procedure, such as a change to use the methods described in § 1.263A–1(d)(2)(iv), (v), or (vi), § 1.263A–2(b), § 1.263A–2(c), or § 1.263A–3(d).

(2) *Restatement of financial statement.* A taxpayer’s restatement of its financial statement does not invalidate the taxpayer’s method of accounting or change its determination of section 471 costs in earlier taxable years.

(3) *Certain eligibility rule inapplicable.* The eligibility rule in section

5.01(1)(f) of Rev. Proc. 2015–13 does not apply to a taxpayer that wants to make a change in method of accounting under section 12.17 of this revenue procedure for the taxpayer’s first, second, or third taxable year ending on or after November 20, 2018.

(4) *Reduced filing requirement.* A taxpayer is required to complete only the following information on Form 3115 (Rev. December 2015) to make this change:

(a) The identification section of page 1 (above Part I);

(b) The signature section at the bottom of page 1;

(c) Part I;

(d) Part II, all lines except lines 13, 15b, 16c, and 19;

(e) Part IV, all lines except line 25; and

(f) Schedule D, all Parts except Part I.

(5) *Limitation.* If a taxpayer making this change in method of accounting uses a historic absorption ratio election under §§ 1.263A–2(b)(4), 1.263A–2(c)(4), or 1.263A–3(d)(4), and the change in the characterization of cost(s) under this section affects any part of the taxpayer’s historic absorption ratio, the taxpayer must revise its previous and current historic absorption ratios. To revise its historic absorption ratios, the taxpayer must apply its proposed method of accounting during the test period, during all recomputation years, and during all updated test periods to determine the section 471 costs and additional section 263A costs that were incurred. The revised historic absorption ratios must be used to revalue beginning inventory and must be accounted for in the taxpayer’s § 481(a) adjustment. The taxpayer must use a method described in § 1.263A–7(c) to revalue beginning inventory.

(6) *Concurrent automatic changes.* A taxpayer making both this change and another automatic change under § 263A for the same year of change may file a single Form 3115 for both changes, provided the taxpayer enters the designated automatic change numbers for both changes on the appropriate line of that Form 3115 and complies with the ordering rules of § 1.263A–7(b)(2). See section 6.03(1)(b) of Rev. Proc. 2015–13 for information on making concurrent changes.

(7) *Designated automatic accounting method change number.* The designated automatic accounting method change number for a change under this section 12.17 is “237.”

(8) *Contact information.* For further information regarding a change under this section, contact Natasha Mulleneaux at (202) 317-7003 (not a toll-free number).

(2) Section 12 of Rev. Proc. 2018–31 is modified to add new section 12.18 to read as follows:

.18 *Revocation of a historic absorption ratio election.*

(1) *Description of change.* This change applies to a taxpayer that uses the simplified resale method with a historic absorption ratio election that wants to revoke its historic absorption ratio election and change to the simplified resale method without a historic absorption ratio. This change also applies to a taxpayer that uses the simplified production method with a historic absorption ratio election that wants to revoke its historic absorption ratio election and change to the simplified production method without a historic absorption ratio. This change applies to a revocation of the simplified resale method with a historic absorption ratio election or the simplified production method with a historic absorption ratio election regardless of whether the year of change is during the taxpayer’s qualifying period.

(2) *Limited applicability.* This change is the exclusive procedure for a taxpayer on the simplified production method with a historic absorption ratio election or the simplified resale method with a historic absorption ratio election that wants to revoke its historic absorption election under the transition rules of §§ 1.263A–2(b)(4)(v)(B) and 1.263A–3(d)(4)(v)(B). This change is applicable only for the taxpayer’s first, second, or third taxable year ending on or after November 20, 2018. A taxpayer that complies with the requirements of this section 12.18 will be deemed to have obtained the consent of the Commissioner to make a revocation of its historic absorption ratio election under § 446(e).

(3) *Certain eligibility rules temporarily inapplicable.* The eligibility rule in section 5.01(1)(f) of Rev. Proc. 2015–13 does not apply for the taxpayer’s first, second

or third taxable year ending on or after November 20, 2018.

(4) *Manner of making change.*

(a) *Cut-off basis.* This change is made on a cut-off basis. Accordingly, a § 481(a) adjustment is neither permitted nor required.

(b) *No audit protection.* A taxpayer does not receive audit protection under section 8.01 of Rev. Proc. 2015-13 in connection with this change if the taxpayer's revocation of a historic absorption ratio election is during a qualifying period, or extended qualifying period. See section 8.02(2) of Rev. Proc. 2015-13.

(5) *Concurrent automatic changes.* A taxpayer making both this change and another automatic change under § 263A for the same year of change may file a single Form 3115 for both changes, provided the taxpayer enters the designated automatic change numbers for both changes on the appropriate line of that Form 3115 and complies with the ordering rules of § 1.263A-7(b)(2). See section 6.03(1)(b) of Rev. Proc. 2015-13 for information on making concurrent changes.

(6) *Designated automatic accounting method change number.* The designated automatic accounting method change number for a change under this section 12.18 is "238."

(7) *Contact information.* For further information regarding a change under this section, contact Natasha Mulleneaux at (202) 317-7003 (not a toll-free number).

#### SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for taxable years ending on or after November 20, 2018.

#### SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2018-31 is modified and amplified.

#### SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Natasha Mulleneaux of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Ms. Mulleneaux at (202)

317-7003 (not a toll-free number).

*26 CFR 301.7508-1: Time for performing certain acts postponed by reason of service in a combat zone or a federally-declared disaster.*

*(Also: Part I, §§ 7508, 7508A; §§ 301.7508-1, 301.7508A-1.)*

## Rev. Proc. 2018-58

### SECTION 1. PURPOSE AND NATURE OF CHANGES

.01 This revenue procedure provides an updated list of time-sensitive acts, the performance of which may be postponed under sections 7508 and 7508A of the Internal Revenue Code (Code). Section 7508 postpones specified acts for individuals serving in the Armed Forces of the United States or serving in support of such Armed Forces in a combat zone or serving with respect to a contingency operation (as defined in 10 U.S.C. § 101(a)(13)). Section 7508A permits a postponement of the time to perform specified acts for taxpayers affected by a federally declared disaster or a terroristic or military action. The list of acts in this revenue procedure supplements the list of postponed acts in section 7508(a)(1) and § 301.7508A-1(c)(1)(vii) of the Procedure and Administration Regulations. Rev. Proc. 2007-56, 2007-2 C.B. 388, is superseded.

.02 This revenue procedure does not, by itself, provide any postponements under section 7508A. In order for taxpayers to be entitled to a postponement of any act listed in this revenue procedure, the Internal Revenue Service (IRS) generally will publish a notice or issue other guidance (including an IRS News Release) providing relief with respect to a federally declared disaster, or a terroristic or military action. See section 4.01 of this revenue procedure.

.03 For purposes of section 7508, this revenue procedure sets forth a list of such other acts that are postponed as contemplated by section 7508(a)(1)(K). Unlike section 7508A, when a taxpayer qualifies under section 7508, all of the acts listed in section 7508(a)(1) are postponed. Therefore, when a taxpayer qualifies under section 7508, the acts listed in this revenue procedure are also postponed for that taxpayer, regardless of whether the IRS publishes a notice or issues other guidance.

.04 This revenue procedure will be updated as needed if the IRS determines that additional acts should be included in the list of postponed acts or that certain acts should be removed from the list. Also, taxpayers may recommend that additional acts be considered for postponement under sections 7508 and 7508A. See section 18 of this revenue procedure.

.05 When a federally declared disaster occurs, IRS guidance usually postpones the time to perform the acts listed in § 301.7508A-1(c)(1) as well as in this revenue procedure. However, because the acts listed in the regulations under the disaster relief provision are only postponed when disaster relief is provided, when an individual qualifies for relief by virtue of service in a combat zone, the time for performing the acts listed in the regulations is not postponed. Thus, to ensure that individuals serving in or serving in support of the Armed Forces in a combat zone or contingency operation receive a postponement of time to perform the acts listed in the regulations, this revenue procedure includes these acts.

### SECTION 2. BACKGROUND

.01 Section 7508(a)(1) of the Code permits a postponement of certain time-sensitive acts for individuals serving in the Armed Forces of the United States, or serving in support of such Armed Forces, in an area designated by the President as a combat zone under section 112(c)(2), or serving with respect to a contingency operation (as defined in 10 U.S.C. § 101(a)(13)). Among these acts are the filing of certain returns, the payment of certain taxes, the filing of a United States Tax Court petition for redetermination of a deficiency, and the filing of a refund claim. In the event of service in a combat zone or service with respect to a contingency operation, the acts specified in section 7508(a)(1) are automatically postponed. This revenue procedure sets forth a list of such other acts that are also automatically postponed as contemplated by section 7508(a)(1)(K). In addition, the IRS may include acts not listed in this revenue procedure in any other published guidance (including an IRS News Release) related to the combat zone or contingency operation.



.02 Section 7508A provides that certain acts performed by taxpayers and the government may be postponed if the taxpayer is affected by a federally declared disaster or a terroristic or military action. Prior to 2008, section 7508A(a) referred to a “Presidentially declared disaster,” defined in section 1033(h)(3). The Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (2008 Act), P.L. 110–343, Division C, § 706(a)(2)(D)(vii), amended section 7508A(a) to refer to a “federally declared disaster,” defined in section 165(h)(3)(C)(i). Section 706(a)(1) of the 2008 Act amended section 165(h) to provide the definition of a “federally declared disaster.” Effective December 19, 2014, the Tax Technical Corrections Act of 2014 (2014 Act), P.L. 113–295, § 221(a)(27), removed the definition of “federally declared disaster” from section 165(h)(3) and placed it in section 165(i)(5). However, the 2014 Act did not amend section 7508A(a) with the new cross-reference for the definition of a “federally declared disaster.” Effective March 23, 2018, the Consolidated Appropriations Act, 2018, P.L. 115–141, § 401(b)(10) amended section 7508A(a) to reflect the cross-reference for the definition of a “federally declared disaster” in section 165(i)(5)(A). However, the regulations under section 7508A have yet to be revised to change the reference to the definition of a federally declared disaster. A “terroristic or military action” is defined in section 692(c)(2). Section 301.7508A–1(d)(1) defines seven types of affected taxpayers, including any individual whose principal residence (for purposes of section 1033(h)(4)) is located in a “covered disaster area” and any business entity or sole proprietor whose principal place of business is located in a “covered disaster area.” Postponements under section 7508A are not available simply because a disaster or a terroristic or military action has occurred. Generally, the IRS will publish a notice or issue other guidance (including an IRS News Release) authorizing the postponement. See section 4.01 of this revenue procedure.

### SECTION 3. SCOPE

This revenue procedure applies to individuals serving in the Armed Forces of

the United States in a combat zone, or serving in support of such Armed Forces, individuals serving with respect to contingency operations, affected taxpayers by reason of federally declared disasters within the meaning of § 301.7508A–1(d)(1), or taxpayers whom the IRS determines are affected by a terroristic or military action. Section 17 of this revenue procedure also applies to transferors who are not affected taxpayers but who are involved in a section 1031 like-kind exchange transaction and are entitled to relief under section 17.02(2) of this revenue procedure.

### SECTION 4. APPLICATION

.01 As provided by § 301.7508A–1(e), in the event of a federally declared disaster or terroristic or military action, the IRS will issue a news release, or other guidance, authorizing the postponement of acts described in this revenue procedure, that defines which taxpayers are considered “affected taxpayers,” and describes the acts postponed, the duration of the postponement, and the location of the covered disaster area. See, for example, IR–2018–199 (summarizing the relief provided for Hurricane Michael). The guidance may provide for postponement of only certain acts listed in this revenue procedure based on the time when the disaster occurred, its severity, and other factors. Unless the notice or other guidance for a particular disaster provides that the relief is limited, the guidance will generally postpone *all* of the acts listed in the regulations and this revenue procedure.

.02 Provisions of the internal revenue laws requiring the timely performance of specified acts postponed under sections 7508 and 7508A are listed in the tables below. In addition, section 17 of this revenue procedure expands the categories of taxpayers qualifying for relief to include transferors of certain property and provides additional postponements of deadlines solely with respect to section 1031 like-kind exchange transactions that are affected by a federally declared disaster. If an IRS News Release or other guidance is issued with respect to a specific federally declared disaster and authorizes postponement of acts in this revenue procedure, affected taxpayers may use the postpone-

ment rules provided in section 17 of this revenue procedure in lieu of section 6 of this revenue procedure. Transferors who are covered by the like-kind exchange rules of section 17 of this revenue procedure, but who are not “affected taxpayers” as defined by the IRS News Release, other guidance, or § 301.7508A–1(d)(1) are not eligible for relief under section 7508A or other sections of this revenue procedure.

.03 The following tables may, but do not necessarily include, acts specified in sections 7508 or 7508A and the regulations thereunder. Thus, for example, no mention is made in the following tables of the filing of tax returns or the payment of taxes (or an installment thereof) because these acts are already covered by sections 7508 and 7508A and the applicable regulations. Also, the following tables generally do not refer to making elections required to be made on tax returns or attachments thereto, or the filing of any form required to be attached to the return, because postponement of the filing of a tax return automatically postpones the time for making any election required to be made on the return or an attachment thereto, or the filing of any form required to be attached to the return. For example, the Form 5471, “Information Return of U.S. Persons With Respect to Certain Foreign Corporations” is required to be attached to the taxpayer’s tax return (or, if applicable, partnership or exempt organization return). Accordingly, the Form 5471 is not included in this revenue procedure because the postponement of the filing of the tax return (or other return) automatically postpones the time to file Form 5471. In addition, these tables generally do not refer to the filing of information returns or furnishing of statements. However, postponed acts relating to information reporting (other than year-end deadlines) are set forth in section 14.02 of this revenue procedure.

This revenue procedure, however, does include acts that are postponed under § 301.7508A–1(c)(1). The regulation lists acts that may be postponed when there has been a federally declared disaster, but does not apply to postpone acts for individuals serving in, or serving in support of, the Armed Forces of the United States in a combat zone or contingency operation. For example, § 301.7508A–

1(c)(1)(iii) provides a postponement for certain contributions to and distributions from qualified retirement plans. This revenue procedure also includes these acts to reflect that they are postponed for individuals serving in, or serving in support of, the Armed Forces of the United States in a combat zone or contingency operation.

.04 The following tables refer only to postponement of acts performed by taxpayers. Additional guidance will be published in the Internal Revenue Bulletin if a decision is made that acts performed by the government may be postponed under section 7508A. See, for example, Notice 2005-82, 2005-47 I.R.B. 978. Additional guidance will also be published if a deci-

sion is made to provide some form of relief in connection with a federally declared disaster other than a postponement of acts. See, for example, Rev. Procs. 2014-50, 2014-37 I.R.B. 540, and 2014-49, 2014-37 I.R.B. 535.

## SECTION 5. ACCOUNTING METHODS AND PERIODS

Statute or Regulation	Act Postponed
1. Chapter 1, Subchapter E of the Code	Any act relating to the adoption, election, retention, or change of any accounting method or accounting period, or to the use of an accounting method or accounting period, that is required to be performed on or before the due date of a tax return (including extensions). Examples of such acts include (a) the requirements in Rev. Procs. 2006-45, 2006-45 I.R.B. 851, 2006-46, 2006-45 I.R.B. 859, 2002-39, 2002-1 C.B. 1046, and 2003-62, 2003-2 C.B. 299, that Form 1128, Application to Adopt, Change, or Retain a Tax Year, be filed with the Director, Internal Revenue Service Center, on or before the due date (or the due date including extensions) of the tax return for the short period required to effect the change in accounting period; and (b) the requirement in Rev. Proc. 2015-13, 2015-5 I.R.B. 419, section 6.03(1), as amended by Rev. Proc. 2018-1, 2018-1 I.R.B. 1, section 9.05(2), that an Application for Change in Accounting Method (Form 3115) must be filed with the timely filed (including extensions) original tax return for the year of the accounting method change and that a duplicate copy of the Form 3115 must be filed with the IRS in Covington, Kentucky, no later than when the original Form 3115 is filed.
2. Sec. 1.381(c)(4)-1(d)(2)	If the acquiring corporation is not permitted to use the method of accounting previously used by it, the method of accounting used by the distributor/transferor corporation, or the principal method of accounting, or if the acquiring corporation wishes to use a new method of accounting, then the acquiring corporation must apply to the Commissioner to use another method. Section 1.381(c)(4)-1(d)(2)(iii) provides that applications are due by the later of (1) the due date for filing the application as specified in § 1.446-1(e), or (2) the earlier of (a) the day that is 180 days after the date of distribution or transfer, or (b) the day on which the acquiring corporation files its federal income tax return for the taxable year in which the distribution or transfer occurred.
3. Sec. 1.381(c)(5)-1(d)(2)	If the acquiring corporation is not permitted to use the inventory method previously used by it, or the inventory method used by the distributor/transferor corporation, or the principal inventory method of accounting, or wishes to use a new inventory method of accounting, then the acquiring corporation must apply to the Commissioner to use another method. Section 1.381(c)(5)-1(d)(2)(iii) provides that applications are due by the later of (1) the due date for filing the application as specified in § 1.446-1(e), or (2) the earlier of (a) the day that is 180 days after the date of distribution or transfer, or (b) the day on which the acquiring corporation files its federal income tax return for the tax year in which the distribution or transfer occurred.
4. Sec. 1.442-1(b)(1)	In order to secure prior approval of an adoption, change, or retention of a taxpayer's annual accounting period, the taxpayer generally must file an application on Form 1128, Application to Adopt, Change, or Retain a Tax Year, with the Commissioner within such time as is provided in administrative procedures published by the Commissioner from time to time. See, for example, Rev. Proc. 2006-45, 2006-2 C.B. 851; Rev. Proc. 2006-46, 2006-2 C.B. 859; Rev. Proc. 2003-62, 2003-2 C.B. 299; and Rev. Proc. 2002-39, 2002-1 C.B. 1046.

Statute or Regulation	Act Postponed
5. Sec. 1.444-3T(b)(1)	A section 444 election must be made by filing Form 8716, Election to Have a Tax Year Other Than a Required Tax Year, with the Service Center. Generally, Form 8716 must be filed by the earlier of (a) the 15th day of the fifth month following the month that includes the first day of the taxable year for which the election will first be effective, or (b) the due date (without regard to extensions) of the income tax return resulting from the section 444 election.
6. Sec. 1.446-1(e)(2)(i)	Section 6.03(1) of Rev. Proc. 2015-13 requires a taxpayer that is changing a method of accounting within the terms of the revenue procedure pertaining to automatic method changes to attach the application form to the timely filed return for the year of change. Section 6.03(4)(a) of Rev. Proc. 2015-13 grants an automatic extension of six months from the due date of the return (excluding extensions) within which to file an amended return with the application for the change following a timely filed original return (including extensions) for the year of change.
7. Sec. 1.446-1(e)(3)(i)	To secure the Commissioner's consent to a change in method of accounting that is not an automatic method change, the taxpayer must file an application on Form 3115, Application for Change in Accounting Method, with the Commissioner during the taxable year in which the taxpayer desires to make the change in method of accounting (i.e., must be filed by the last day of such taxable year). This filing requirement is also in Rev. Proc. 2015-13, section 6.03(2).
8. Sec. 451(g)	Section 451(g) permits a taxpayer using the cash receipts and disbursements method of accounting who derives income from the sale or exchange of livestock in excess of the number he would sell if he followed his usual business practices to elect (which election is deemed valid if made within the period described in section 1033(e)(2)) to include such income for the taxable year following the taxable year of such sale or exchange if, under his usual business practices, the sale or exchange would not have occurred if it were not for drought, flood, or other weather-related conditions and that such conditions resulted in the area being designated as eligible for Federal assistance.
9. Sec. 1.7519-2T(a)(1)-(4)	A partnership or S corporation must file a Form 8752, Required Payment or Refund Under Section 7519, if the taxpayer has made an election under section 444 to use a taxable year other than its required taxable year and the election is still in effect. The Form 8752 must be filed and any required payment must be made by the date stated in the instructions to Form 8752.
10. Rev. Proc. 92-29, 1992-1 C.B. 748, Section 6.02	A developer of real estate requesting the Commissioner's consent to use the alternative cost method must file a private letter ruling request within 30 days after the close of the taxable year in which the first benefited property in the project is sold. The request must include the information described in section 6.04 of the revenue procedure and a consent extending the period of limitation on the assessment of income tax with respect to the use of the alternative cost method.

## SECTION 6. BUSINESS AND INDIVIDUAL TAX ISSUES

Statute or Regulation	Act Postponed
1. Sec. 1.71-1T(b), Q&A-7	A payor spouse may send cash to a third party on behalf of a spouse that qualifies for alimony or separate maintenance payments if the payments are made to the third party at the written request or consent of the payee spouse. The request or consent must state that the parties intend the payment to be treated as an alimony payment to the payee spouse subject to the rules of section 71. The payor spouse must receive the request or consent prior to the date of filing of the payor spouse's first return of tax for the taxable year in which the payment was made. Section 1.71-1T(b), Q&A 7, will no longer apply to divorce or separation instruments entered into after December 31, 2018, or to any divorce or separation instruments entered into before December 31, 2018, that are modified after that date if the modification expressly provides that the amendments to section 71 made by section 11051 of "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," P.L. 115-97, apply to the modification.



Statute or Regulation	Act Postponed
2. Sec. 1.110-1(b)(4)(ii)(A)	The lessee must expend its construction allowance on the qualified long-term real property within 8 1/2 months after the close of the taxable year in which the construction allowance was received.
3. Sec. 118(c)(2)	A contribution in aid of construction received by a regulated public utility that provides water or sewerage disposal services must be expended by the utility on qualifying property before the end of the second taxable year after the year in which it was received by the utility.
4. Sec. 170(f)(12)(C)	A taxpayer claiming a charitable contribution deduction of more than \$500 for a gift of a qualified vehicle must obtain a written acknowledgment of the contribution by the donee organization within 30 days of the contribution or the sale of the vehicle by the donee organization, as applicable.
5. Sec. 1.170A-5(a)(2)	A contribution of an undivided present interest in tangible personal property shall be treated as made upon receipt by the donee of a formally executed and acknowledged deed of gift. The period of initial possession by the donee may not be deferred for more than one year.
6. Sec. 172(b)(1)	A taxpayer entitled to a carryback period for a farming loss under § 172(b)(1)(B) may elect to relinquish the carryback period for any taxable year. The taxpayer must make the election by the due date of the taxpayer's federal income tax return (including extensions) for the taxable year of the net operating loss for which the election is to be effective.
7. Sec. 172(b)(3)	A taxpayer entitled to a carryback period under section 172(b)(1) may elect to relinquish the entire carryback period with respect to a net operating loss for any taxable year. The taxpayer must make the election by the due date of the taxpayer's federal income tax return (including extensions) for the taxable year of the net operating loss for which the election is to be effective.
8. Sec. 172(g)(6)	A taxpayer entitled to a 10-year carryback under section 172(b)(1)(C) (as in effect on December 31, 2017, and relating to certain specified liability losses) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to that section. The taxpayer must make the election by the due date of the taxpayer's federal income tax return (including extensions) for the taxable year of the net operating loss.
9. Sec. 172(h)(3)	A taxpayer entitled to a 5-year carryback period under section 172(b)(1)(G) (as in effect on December 31, 2017, and relating to certain farming losses) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to that section. The taxpayer must make the election by the due date of the taxpayer's federal income tax return (including extensions) for the taxable year of the net operating loss.
10. Sec. 468A(g)	A taxpayer that makes payments to a nuclear decommissioning fund with respect to a taxable year must make the payments within 2 1/2 months after the close of such taxable year (the deemed payment date).
11. Sec. 1.468A-3(h)(1)(v)	A taxpayer must file a request for a schedule of ruling amounts for a nuclear decommissioning fund by the deemed payment date (2 1/2 months after the close of the taxable year for which the schedule of ruling amounts is sought).
12. Sec. 1.468A-3(h)(1)(vii)	A taxpayer has 30 days to provide additional requested information with respect to a request for a schedule of ruling amounts. If the information is not provided within the 30 days, the request will not be considered filed until the date the information is provided.
13. Sec. 529(c)(3)(C)(i)	A rollover contribution to another qualified tuition program or to an ABLE account must be made no later than the 60th day after the date of a distribution from a qualified tuition program.
14. Sec. 529(c)(3)(D)	If a beneficiary receives a refund of qualified higher education expenses from an eligible educational institution, any portion of the distribution refunded that is recontributed to a qualified tuition program of which the individual is the beneficiary not later than 60 days after the refund date is not subject to tax.

Statute or Regulation	Act Postponed
15. Sec. 529A(b)(2), Sec. 529A(c)(3)(C)	Excess contributions (and any earnings on the excess) to an ABLE account must be distributed by the due date (including extensions of time) for the filing of designated beneficiary's return for the taxable year in which the contributions were made to ensure that the distribution is not included in the gross income of the designated beneficiary.
16. Sec. 529A(c)(1)(C)(i)	A rollover contribution to another ABLE account must be made no later than the 60th day after the date of a payment or distribution from an ABLE account.
17. Sec. 529A(c)(4)	An ABLE account must be closed no later than the 60th day after the date of a payment or distribution from an ABLE account rolled over to another account for the same beneficiary.
18. Sec. 529A(d)	A qualified ABLE program must provide certain information concerning the ABLE account to the designated beneficiary by March 15 following the calendar year to which the information relates. In addition, Form 5498-QA, ABLE Account Contribution Information, must be filed with the IRS by May 31 following the calendar year to which the information relates.
19. Sec. 530(b)(5)	An individual shall be deemed to have made a contribution to a Coverdell education savings account on the last day of the preceding taxable year if the contribution is made on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (not including extensions thereof).
20. Sec. 530(d)(4)(C)(i)	Excess contributions (and any earnings on the excess) to a Coverdell education savings account must be distributed before the first day of the sixth month of the following taxable year.
21. Sec. 530(d)(5)	A rollover contribution to another Coverdell education savings account must be made no later than the 60th day after the date of a payment or distribution from a Coverdell education savings account.
22. Sec. 530(h)	A trustee of a Coverdell education savings account must provide certain information concerning the account to the beneficiary by January 31 following the calendar year to which the information relates. In addition, Form 5498-ESA, Coverdell ESA Contribution Information, must be filed with the IRS by May 31 following the calendar year to which the information relates.
23. Sec. 563(a)	In the determination of the dividends paid deduction for purposes of the accumulated earnings tax imposed by section 531, a dividend paid after the close of any taxable year and on or before the 15th day of the fourth month following the close of such taxable year shall be considered as paid during such taxable year. The close of the taxable year is not affected by this revenue procedure; the 3 1/2 -month period within which the dividend is paid is the period extended.
24. Sec. 563(b)	In the determination of the dividends paid deduction for purposes of the personal holding company tax imposed by section 541, a dividend paid after the close of any taxable year and on or before the 15th day of the fourth month following the close of such taxable year shall, to the extent the taxpayer elects in its return for the taxable year, be considered as paid during such taxable year. The close of the taxable year is not affected by this revenue procedure; the 3 1/2 -month period within which the dividend is paid is the period extended.
25. Sec. 563(c)	For the purpose of applying section 562(a), with respect to distributions under subsection (a) or (b) of section 562, a distribution made after the close of the taxable year and on or before the 15th day of the fourth month following the close of the taxable year shall be considered as made on the last day of such taxable year. The close of the taxable year is not affected by this revenue procedure; the 3 1/2 -month period within which the dividend is paid is the period extended.
26. Sec. 1031(a)(3)	In a deferred exchange, property otherwise qualified as like-kind property under section 1031 is treated as like-kind property if the 45-day identification period and the 180-day exchange period requirements under section 1031(a)(3) and § 1.1031(k)-1(b)(2) are met. See also section 17 of this revenue procedure.

Statute or Regulation	Act Postponed
27. Sec. 1031	Property held in a qualified exchange accommodation arrangement may qualify as “replacement property” or “relinquished property” under section 1031 if the requirements of section 4 of Rev. Proc. 2000–37, 2000–2 C.B. 308, modified by Rev. Proc. 2004–51, 2004–2 C.B. 294, are met, including the 5-business day period to enter into a qualified exchange accommodation agreement (QEAA), the 45-day identification period, the 180-day exchange period, and the 180-day combined time period. See also section 17 of this revenue procedure.
28. Sec. 1033	An election respecting the nonrecognition of gain on the involuntary conversion of property (§ 1.1033(a)–2(c)(1) and (2)) is required to be made within the time periods specified in § 1.1033(a)–2(c)(3), § 1.1033(g)–1(c), section 1033(e)(2)(A), or section 1033(h)(1)(B), as applicable.
29. Sec. 1043(a)	If an eligible person (as defined under section 1043(b)) sells any property pursuant to a certificate of divestiture, then at the election of the taxpayer, gain from such sale shall be recognized only to the extent that the amount realized on such sale exceeds the cost of any permitted property purchased by the taxpayer during the 60-day period beginning on the date of such sale.
30. Sec. 1045(a)	A taxpayer other than a corporation may elect to roll over gain, to the extent permitted under section 1045(a) and (b), from the sale of qualified small business stock held for more than six months to another qualified small business stock, if other qualified small business stock is purchased by the taxpayer during the 60-day period beginning on the date of sale.
31. Sec. 1382(d)	An organization, to which section 1382(d) applies, is required to pay a patronage dividend within 8 1/2 months after the close of the year.
32. Sec. 1388(j)(3)(A)	Any cooperative organization that exercises its option to net patronage gains and losses, is required to give notice to its patrons of the netting by the 15th day of the ninth month following the close of the taxable year.
33. Sec. 301.7701–3(c)	The effective date of an entity classification election (Form 8832, Entity Classification Election) cannot be more than 75 days prior to the date on which the election is filed.
34. Sec. 301.9100–2(a)(1)	An automatic extension of 12 months from the due date for making a regulatory election is granted to make certain elections described in § 301.9100–2(a)(2), including the election to use other than the required taxable year under section 444, and the election to use the last-in, first out (LIFO) inventory method under section 472.
35. Sec. 301.9100–2(b)-(d)	An automatic extension of six months from the due date of a return, excluding extensions, is granted to make the regulatory or statutory elections whose due dates are the due date of the return or the due date of the return including extensions (for example, a taxpayer has an automatic six-month extension to file an application to change a method of accounting under Rev. Proc. 2015–13), provided the taxpayer (a) timely filed its original return for the year of election, (b) within that six month extension period, takes the required corrective action to file the election in accordance with the statute, regulations, revenue procedure, revenue ruling, notice, or announcement permitting the election, and (c) writes at the top of the return, statement of election or other form “FILED PURSUANT TO § 301.9100–2.”

## SECTION 7. CORPORATE ISSUES

Statute or Regulation	Act Postponed
1. Sec. 302(e)(1)	A corporation must complete a distribution in pursuance of a plan of partial liquidation of a corporation within the specified period.
2. Sec. 303 and Sec. 1.303–2	A corporation must complete the distribution of property to a shareholder in redemption of all or part of the stock of the corporation that (for federal estate tax purposes) is included in determining the estate of a decedent. Section 303 and § 1.303–2 require, among other things, that the distribution occur within the specified period.



Statute or Regulation	Act Postponed
3. Sec. 304(b)(3)(C)	If certain requirements are met, section 304(a) does not apply to a transaction involving the formation of a bank holding company. One requirement is that within a specified period (generally two years) after control of a bank is acquired, stock constituting control of the bank is transferred to a bank holding company in connection with the bank holding company's formation.
4. Secs. 316(b)(2)(A) and (B)(ii) and Sec. 1.316-1(b)(2)	A personal holding company may designate as a dividend to a shareholder all or part of a distribution in complete liquidation described in section 316(b)(2)(B) and § 1.316-1(b) within 24 months after the adoption of a plan of liquidation by, inter alia, following the procedure provided by § 1.316-1(b)(5).
5. Sec. 332(b) and Secs. 1.332-3 and 1.332-4	A corporation must completely liquidate a corporate subsidiary within the specified period.
6. Sec. 1.336-2(h)	An election to treat certain stock dispositions as asset sales. The election must be made on certain filers' tax returns that include the "disposition date."
7. Sec. 1.336-1(b)(7)	A seller or S corporation shareholder must complete a "qualified stock disposition" of a target corporation's stock within a 12-month disposition period.
8. Sec. 338(d)(3) and (h), and Sec. 1.338-2	An acquiring corporation must complete a "qualified stock purchase" of a target corporation's stock within the specified acquisition period.
9. Sec. 338(g) and Sec. 1.338-2	An acquiring corporation may elect to treat certain stock purchases as asset acquisitions. The election must be made within the specified period.
10. Sec. 338(h)(10) and Sec. 1.338(h)(10)-1(c)	An acquiring corporation and selling group of corporations may elect to treat certain stock purchases as asset purchases, and to avoid gain or loss upon the stock sale. The election must be made within the specified period.
11. Sec. 1.381(c)(17)-1(c)	An acquiring corporation files a Form 976, Claim for Deficiency Dividends Deductions by a Personal Holding Company, Regulated Investment Company, or Real Estate Investment Trust, within 120 days after the date of the determination under section 547(c) to claim a deduction of a deficiency dividend.
12. Sec. 1.441-3(b)	A personal service corporation may obtain the approval of the Commissioner to adopt, change, or retain an annual accounting period by filing Form 1128, Application to Adopt, Change, or Retain a Tax Year, within such time as is provided in the administrative procedures published by the Commissioner. See Rev. Procs. 2006-46, 2006-2 C.B. 859, and 2002-39, 2002-1 C.B. 1046.
13. Sec. 562(b)(1)(B)	In the case of a complete liquidation (except in the case of a complete liquidation of a personal holding company) occurring within 24 months after the adoption of a plan of liquidation, any distribution within such period pursuant to such plan shall, to the extent of the earnings and profits (computed without regard to capital losses) of the corporation for the taxable year in which such distribution is made, be treated as a dividend for purposes of computing the dividends paid deduction.
14. Sec. 562(b)(2)	In the case of a complete liquidation of a personal holding company occurring within 24 months after the adoption of a plan of liquidation, the amount of any distribution within such period pursuant to such plan shall be treated as a dividend for purposes of computing the dividends paid deduction to the extent that such amount is distributed to corporate distributees and represents such corporate distributees' allocable share of the undistributed personal holding company income for the taxable year of such distribution.
15. Sec. 597 and Sec. 1.597-4(g)	A consolidated group of which an Institution (as defined by § 1.597-1(b)) is a subsidiary may elect irrevocably not to include the Institution in its affiliated group if the Institution is placed in Agency Receivership (as defined by § 1.597-1(b)), whether or not assets or deposit liabilities of the Institution are transferred to a Bridge Bank (as defined by § 1.597-1(b)). Except as otherwise provided in § 1.597-4(g)(6), a consolidated group makes the election by sending a written statement by certified mail to the affected Institution on or before 120 days after its placement in Agency Receivership.
16. Sec. 1502 and Sec. 1.1502-75(c)(1)(i)	A common parent must apply for permission to discontinue filing consolidated returns within a specified period after the date of enactment of a law affecting the computation of tax liability.

Statute or Regulation	Act Postponed
17. Sec. 1502 and Sec. 1.1502-13(f)(5)(ii)(B)	If a member of a consolidated group (S) recognizes gain on the sale of stock of a subsidiary (old T) to another member (B) and B liquidates old T, B must transfer substantially all of old T's assets to a new member (new T) within a specified period of time in order for S's gain on the sale of old T stock to be taken into account based on the new T stock.
18. Sec. 6425 and Sec. 1.6425-1	Corporations applying for an adjustment of an overpayment of estimated income tax must file Form 4466, Corporation Application for Quick Refund of Overpayment of Estimated Tax, on or before the 15th day of the third month after the taxable year, or before the date the corporation first files its income tax return for such year, whichever is earlier.
19. Rev. Proc. 2003-33, 2003-1 C.B. 803, Section 5	If the filer complies with the procedures set forth in the revenue procedure, including a requirement that the filer file Form 8023, Elections Under Section 338 for Corporations Making Qualified Stock Purchases, within the specified period, the filer is granted an automatic extension under § 301.9100-3 to file an election under section 338.

## SECTION 8. EMPLOYEE BENEFIT ISSUES

Statute or Regulation	Act Postponed
1. Sec. 72(p)(2)(B) and (C), and Sec. 1.72(p)-1, Q&A-10	A loan from a qualified employer plan to a participant in, or a beneficiary of, such plan must be repaid in accordance with the timing requirements of section 72(p)(2)(B) and the level amortization requirement of section 72(p)(2)(C) (taking into account, if applicable, any cure period granted pursuant to § 1.72(p)-1, Q&A-10(a)).
2. Sec. 72(t)(2)(A)(iv)	To be eligible for the exception to the 10-percent additional tax on a distribution from a qualified retirement plan under section 72(t)(2)(A)(iv), the distribution must be part of a series of substantially equal periodic payments (not less frequently than annually) made over the employee's life (or life expectancy) or the joint lives (or joint life expectancies) of the employee and his or her designated beneficiary.
3. Sec. 72(t)(2)(F), 72(t)(8)(A)	To be eligible for the exception to the 10-percent additional tax on a distribution from an individual retirement plan (IRA) for a first-time home purchase under section 72(t)(2)(F), the distribution must be used by the individual before the close of the 120th day after the day on which such distribution is received to pay qualified acquisition costs with respect to a principal residence of a first-time homebuyer, or under certain circumstances, rolled into an IRA in accordance with section 408(d)(3).
4. Sec. 72(t)(2)(G)(ii)	All or part of a qualified reservist distribution from a retirement plan to an individual called to active duty may be contributed to an IRA within two years after the active duty period ends.
5. Sec. 83(b) and Sec. 1.83-2(b)	If substantially nonvested property to which section 83 applies is transferred to any person, the service provider may elect to include the excess of the fair market value of the property over the amount paid for the property (if any) in gross income for the taxable year in which such property is transferred. This election must occur not later than 30 days after the date the property was transferred.
6. Sec. 83(i)	Qualified employees who are granted stock options or restricted stock units (RSUs) and who later receive stock upon exercise of the option or settlement of the RSU (qualified stock) may elect to defer the recognition of income for up to five years if certain requirements are met. This election must be made not later than 30 days after the first date the rights of the employee in the qualified stock are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier.
7. Proposed Sec. 1.125-2	Cafeteria plan participants will not be taxed on the permitted taxable benefits if they elect the qualified benefits they will receive before the beginning of the period during which the benefits will be provided.
8. Proposed Sec. 1.125-5(c)	Cafeteria plan participants will not be taxed on unused amounts if, at the end of the plan year, they forfeit amounts elected but not used during the plan year.

Statute or Regulation	Act Postponed
9. Proposed Sec. 1.125-1(o)(4)	Cafeteria plan participants may receive the value of unused vacation days in cash on or before the earlier of the last day of the cafeteria plan year or the last day of the employee's taxable year to which the unused days relate.
10. Sec. 1.162-27(e)(2)	A performance goal is considered pre-established if it is established in writing by the corporation's compensation committee not later than 90 days after the commencement of the period of service to which the performance goal relates if the outcome is substantially uncertain at the time the compensation committee actually establishes the goal. In no event, however, will the performance goal be considered pre-established if it is established after 25 percent of the period of service has elapsed.
11. Sec. 219(f)(3)	A contribution to an IRA shall be deemed to have been made by the taxpayer on the last day of the preceding taxable year if the contribution is made on account of such taxable year and is made not later than the time prescribed for filing the return (not including extensions thereof) for such taxable year.
12. Sec. 220(f)(5)	A rollover contribution to an Archer MSA must be made no later than the 60th day after the day on which the account holder receives a payment or distribution from an Archer MSA.
13. Sec. 220(h)	A trustee or custodian of an MSA (Archer MSA or Medicare+Choice MSA) must provide certain information concerning the MSA to the account holder by January 31 following the calendar year to which the information relates. In addition, MSA contribution information must be furnished to the account holder, and Form 5498-SA filed with the IRS, by May 31 following the calendar year to which the information relates.
14. Sec. 223(f)(5)	A rollover contribution to a Health Savings Account (HSA) must be made no later than the 60th day after the day on which the account beneficiary receives a payment or distribution from an HSA.
15. Sec. 223(h)	A trustee or custodian of an HSA must provide certain information concerning the HSA to the account beneficiary by January 31 following the calendar year to which the information relates. In addition, HSA contribution information must be furnished to the account beneficiary, and Form 5498-SA filed with the IRS, by May 31 following the calendar year to which the information relates.
16. Secs. 401(a)(9), 403(a)(1), 403(b)(10), 408(a)(6), 408(b)(3) and 457(d)(2), and Secs. 1.401(a)(9)-4, 1.401(a)(9)-6, A-17, 1.401(a)(9)-8, A-2, 1.403(b)-6(e)(9), and 1.408-8, A-12.	Generally, the first required minimum distribution from plans subject to the rules in section 401(a)(9) must be made no later than the required beginning date, and subsequent required minimum distributions must be made by the end of each distribution calendar year. Certain timing requirements apply for purposes of determining an employee's designated beneficiaries in the year following the employee's death. Distributions under a qualifying longevity annuity contract (QLAC) must be made on or before certain dates. An excess premium under a QLAC must be returned by the end of the calendar year following the calendar year in which it was paid. A non-spousal beneficiary under a QLAC with a set beneficiary designation must be designated by a certain date.
17. Sec. 401(a)(28)(B)(i)	A qualified participant in an ESOP (as defined in section 401(a)(28)(B)(iii)) may elect within 90 days after the close of each plan year in the qualified election period (as defined in section 401(a)(28)(B)(iv)) to direct the plan as to the investment of at least 25 percent of the participant's account in the plan (50 percent in the case of the last election).
18. Sec. 401(a)(28)(B)(ii)	A plan must distribute the portion of the participant's account covered by an election under section 401(a)(28)(B)(i) within 90 days after the period during which an election can be made; or the plan must offer at least three investment options (not inconsistent with regulations prescribed by the Secretary) to each participant making the election under section 401(a)(28)(B)(i) and within 90 days after the period during which the election may be made, the plan must invest the portion of the participant's account in accordance with the participant's election.
19. Sec. 401(a)(30) and Secs. 1.401(a)-30 and 1.402(g)-1	Excess deferrals for a calendar year, plus income attributable to the excess through the end of the calendar year, must be distributed no later than the first April 15 following the calendar year.



Statute or Regulation	Act Postponed
20. Sec. 401(b), Sec. 1.401(b)-1, and Rev. Proc. 2016-37, 2016-29 I.R.B. 136	A retirement plan that fails to satisfy the requirements of section 401(a) or section 403(a) on any day because of a disqualifying provision will be treated as satisfying such requirements on such day if, prior to the expiration of the applicable remedial amendment period, all plan provisions necessary to satisfy the requirements of section 401(a) or 403(a) are in effect and have been made effective for the whole of such period.
21. Sec. 401(k)(8)	A cash or deferred arrangement must distribute excess contributions for a plan year, plus income attributable to the excess through the end of the plan year, pursuant to the terms of the arrangement no later than the close of the following plan year.
22. Sec. 401(m)(6)	A plan subject to section 401(m) must distribute excess aggregate contributions for a plan year, plus income attributable to the excess through the end of the plan year, pursuant to the terms of the plan, no later than the close of the following plan year.
23. Secs. 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)(B)	An eligible rollover distribution may be rolled over to an eligible retirement plan, including an IRA, no later than the 60th day following the day the distributee received the distributed property.
24. Sec. 402(c)(3)(C)	A qualified plan loan offset amount may be rolled over to an eligible retirement plan no later than the due date (including extensions) for filing the return of tax for the taxable year in which such amount is treated as distributed from a qualified employer plan.
25. Sec. 402(g)(2)(A) and Sec. 1.402(g)-1	An individual with excess deferrals for a taxable year must notify a plan not later than the first March 1 following the taxable year that excess deferrals have been contributed to the plan for the taxable year. A distribution of excess deferrals identified by the individual, plus income attributable to the excess through the end of the taxable year, must be made no later than the first April 15 following the taxable year of the excess.
26. Secs. 404(a)(6), 404(h)(1)(B), and 404(m)(2)	A contribution to a qualified retirement plan, a simplified employee pension, or a SIMPLE IRA plan shall be deemed to have been made by the taxpayer on the last day of the preceding taxable year if the contribution is on account of such taxable year and is made not later than the time prescribed for filing the return for such taxable year (including extensions).
27. Sec. 404(k)(2)(A)(ii)	An ESOP receiving dividends on stock of a C corporation maintaining the plan must distribute the dividends in cash to participants or beneficiaries not later than 90 days after the close of the plan year in which the dividends were paid.
28. Sec. 408(d)(4)	A distribution of any contribution made for a taxable year to an IRA shall be included in gross income unless such distribution (which must include earnings attributable to the contribution) is received on or before the day prescribed by law (including extensions of time) for filing such individual's return for such taxable year.
29. Secs. 408(i) and 6047(c)	A trustee or issuer of an IRA must provide certain information concerning the IRA to the IRA owner by January 31 following the calendar year to which the information relates. In addition, IRA contribution information must be furnished to the owner, and Form 5498 filed with the IRS, by May 31 following the calendar year to which the information relates.
30. Sec. 408A(d)(6)	If, on or before the date prescribed by law (including extensions of time) for filing the taxpayer's return for a taxable year, a taxpayer transfers in a trustee-to-trustee transfer any contribution (other than a qualified rollover contribution) to an IRA made during such taxable year from such IRA to any other IRA and the transfer includes net earnings attributable to that contribution, then such contribution shall be treated as having been made to the transferee IRA (and not the transferor IRA).

Statute or Regulation	Act Postponed
31. Sec. 409(h)(4)	An employer required to repurchase employer securities under section 409(h)(1)(B) must provide a put option for a period of at least 60 days following the date of distribution of employer securities from an ESOP to a participant, and if the put option is not exercised, for an additional 60-day period in the following plan year. A participant who receives a distribution of employer securities under section 409(h)(1)(B) must have the right to exercise the put option provided by that section for a period of at least 60 days following the date of distribution, or if the put option is not exercised within that period, for an additional 60-day period in the following plan year.
32. Sec. 409(h)(5)	An employer required to repurchase employer securities distributed as part of a total distribution from an ESOP must pay for the securities in substantially equal periodic payments (at least annually) over a period beginning not later than 30 days after the exercise of the put option and not exceeding five years.
33. Sec. 409(h)(6)	An employer required to repurchase employer securities distributed as part of an installment distribution from an ESOP must pay for the securities not later than 30 days after the exercise of the put option under section 409(h)(4).
34. Sec. 409(o)	An ESOP must commence the distribution of a participant's account balance, if the participant elects, not later than one year after the close of the plan year — i) in which the participant separates from service by reason of attaining normal retirement age under the plan, death or disability; or ii) which is the fifth plan year following the plan year in which the participant otherwise separates from service (except if the participant is reemployed before distribution is required to begin). An ESOP must also, unless the participant elects otherwise, distribute the participant's account balance in substantially equal payments over a period not longer than five years (a longer period applies if the account balance exceeds \$800,000, as adjusted for cost of living).
35. Sec. 414(w)(2) and Sec. 1.414(w)-1(c)	An employee can elect a permissible withdrawal from an eligible automatic contribution arrangement (EACA) if the election is made within 90 days of the date of the employee's first elective contribution under the EACA.
36. Sec. 1042(a)(2)	A taxpayer must purchase qualified replacement property (defined in section 1042(c)(4)) within the replacement period, defined in section 1042(c)(3) as the period which begins three months before the date of the sale of qualified securities to an ESOP and ends 12 months after the date of such sale.
37. Sec. 4972(c)(3)	Nondeductible contributions to a qualified employer plan must be distributed prior to a certain date to avoid the imposition of a 10 percent tax.
38. Sec. 4973	Excess contributions to an IRA or certain other tax-favored accounts must be distributed prior to a certain date to avoid the imposition of a six percent tax.
39. Sec. 4979 and Sec. 54.4979-1	A 10 percent tax on the amount of excess contributions and excess aggregate contributions under a plan for a plan year will be imposed unless the excess, plus income through the end of the plan year attributable to the excess is distributed (or, if forfeitable, forfeited) no later than 2 1/2 months (six months in the case of an EACA) after the close of the plan year. In the case of a salary reduction simplified employee pension (SARSEP), the employer must notify employees of the excess and the tax consequences within the 2 1/2 -month period to avoid the tax.
40. Secs. 6057, 6058, and 6059	Form 5500, Annual Return/Report of Employee Benefit Plan; Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan; Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan (Form 5500 series), which are used to report annual information concerning employee benefit plans and fringe benefit plans, must be filed by a specified time. Form 8955-SSA, Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits, which is used to report information about separated participants with deferred vested benefits under a plan, must be filed by a specified time.

*General Advice*

## Statute or Regulation

## Act Postponed

Affected filers are advised to follow the instructions accompanying the Form 5500 series or Form 8955–SSA (or other guidance published on the postponement) regarding how to file the forms when postponements are granted pursuant to section 7508 or section 7508A.

*Combat Zone Postponements under Section 7508*

Individual taxpayers who meet the requirements of section 7508 are entitled to a postponement of the Form 5500 series filing due date under section 7508. The postponement of the Form 5500 series filing due date under section 7508 will also be permitted by the Department of Labor and the Pension Benefit Guaranty Corporation (PBGC) for similarly situated individuals who are plan administrators.

*Postponements for Federally Declared Disasters and Terroristic or Military Actions under Section 7508A*

In the case of “affected taxpayers,” as defined in § 301.7508A–1(d), the IRS may permit a postponement of the Form 5500 series filing due date. Taxpayers who are unable on a timely basis to obtain information necessary for completing the forms from a bank, insurance company, or any other service provider because such service provider’s operations are located in a covered disaster area will be treated as “affected taxpayers.” Whatever postponement of the Form 5500 series filing due date is permitted by the IRS under section 7508A will also be permitted by the Department of Labor and PBGC for similarly situated plan administrators and direct filing entities.

41. Sec. 6343(f)

If the Secretary determines that an individual’s account or benefit under an eligible retirement plan (including an IRA) has been wrongfully levied upon (or that the levy was premature or otherwise not in accordance with administrative procedures of the Secretary), and property or an amount of money is returned to the individual, the individual may roll over the property or amount (plus interest paid) to an eligible retirement plan no later than the due date (not including extensions) for the filing of the return of tax for the taxable year in which the property or amount is returned.

42. Rev. Proc. 2016–51,  
2016–42 I.R.B. 466, Sections  
9.02(1) and (2)

The correction period for self-correction of operational failures is the last day of the second plan year following the plan year for which the failure occurred, except that a special rule applies in the case of a failure to satisfy section 401(k)(3) or 401(m)(2). The correction period for self-correction of operational failures for transferred assets does not end until the last day of the first plan year that begins after the corporate merger, acquisition, or other similar employer transaction.

43. Rev. Proc. 2018–4, Appen-  
dix A, Section .09(1)

If a plan is not required to file a Form 5500 series return, for Voluntary Correction Program (VCP) user fee purposes, the amount of net assets generally will be the amount as of the last day of the most recently completed plan year preceding the date of the VCP submission. However, if this information has not been compiled by the time the plan sponsor is ready to make a VCP submission to the IRS, the plan sponsor may use the amount of net assets associated with the most recently completed prior plan year for which information on the amount of net assets is available. This exception will not apply if the VCP submission is mailed to the IRS more than seven months after the close of the most recently completed plan year preceding the date of the VCP submission.

44. Rev. Proc. 2016–51, Section  
14.03

If an examination of a plan in the Audit Closing Agreement Program (Audit CAP) involves a plan with transferred assets and the IRS determines that no new incidents of the failures that relate to the transferred assets occurred after the end of the second plan year that begins after the corporate merger, acquisition, or other similar employer transaction, the sanction under Audit CAP will not exceed the sanction that would apply if the transferred assets were maintained as a separate plan.



## SECTION 9. ESTATE, GIFT AND TRUST ISSUES

Statute or Regulation	Act Postponed
1. Sec. 643(g)	The trustee may elect to treat certain payments of estimated tax as paid by the beneficiary. The election shall be made on or before the 65th day after the close of the taxable year of the trust.
2. Sec. 645 and Sec. 1.645-1(c)	An election to treat a qualified revocable trust as part of the decedent's estate must be made by filing Form 8855, Election To Treat a Qualified Revocable Trust as Part of an Estate, by the due date (including extensions) of the estate's Federal income tax return for the estate's first taxable year, if there is an executor, or by the due date (including extensions) of the trust's Federal income tax return for the trust's first taxable year (treating the trust as an estate), if there is no executor.
3. Sec. 663(b) and Sec. 1.663(b)-2	The fiduciary of a trust or estate may elect to treat any amount properly paid or credited to a beneficiary within the first 65 days following the close of the taxable year as an amount that was properly paid or credited on the last day of such taxable year. If a return is required to be filed for the taxable year for which the election is made, the election shall be made on such return no later than the time for making such return (including extensions). If no return is required to be filed, the election shall be made in a separate statement filed with the internal revenue office with which a return would have been filed, no later than the time for making a return (including extensions).
4. Sec. 664, Sec. 642, and Sec. 4947, and Secs. 1.664-1, 1.642(c)-5, and 53.4947-1	All charitable remainder trusts described under section 664, all pooled income funds described under section 642(c)(5), and all other trusts that meet the definition of a split-interest trust under section 4947(a)(2) must file an annual return, Form 5227, Split-Interest Trust Information Return, to report financial activities, provide information about charitable deductions and distributions, and determine if the trust is treated as a private foundation and subject to certain excise taxes on or before the 15th day of the fourth month following the close of the taxable year. In addition, a charitable remainder trust must give each recipient of a current distribution a Schedule K-1 (Form 1041) that reflects that recipient's current distribution.
5. Sec. 2011(c)	The executor of a decedent's estate must file a claim for a credit for state estate, inheritance, legacy or succession taxes by filing a claim within four years of filing Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. (Section 2011 does not apply to estates of decedents dying after December 31, 2004; see section 2058).
6. Sec. 2014(e)	The executor of a decedent's estate must file a claim for foreign death taxes within four years of filing Form 706.
7. Sec. 2016 and Sec. 20.2016-1	If an executor of a decedent's estate (or any other person) receives a refund of any state or foreign death taxes claimed as a credit on Form 706, the IRS must be notified within 30 days of receipt. (Section 2016 is amended effective for estates of decedents dying after December 31, 2004; see section 2058).
8. Sec. 2031(c)	If an executor of a decedent's estate elects on Form 706 to exclude a portion of the value of land that is subject to a qualified conservation easement, agreements relating to development rights must be implemented within two years after the date of the decedent's death.
9. Sec. 2032(d)	The executor of a decedent's estate may elect an alternate valuation on a late filed Form 706 if the Form 706 is not filed later than one year after the due date.
10. Sec. 2032A(c)(7)	A qualified heir, with respect to specially valued property, is provided a two-year grace period immediately following the date of the decedent's death in which the failure by the qualified heir to begin using the property in a qualified use will not be considered a cessation of qualified use and therefore will not trigger additional estate tax.
11. Sec. 2032A(d)(3)	The executor of a decedent's estate has 90 days after notification of incomplete information/signatures to provide the information/signatures to the IRS regarding an election on Form 706 with respect to specially valued property.

Statute or Regulation	Act Postponed
12. Sec. 2046	A taxpayer may make a qualified disclaimer no later than nine months after the later of the date of the transfer creating the interest, or the date the taxpayer attains age 21.
13. Sec. 2053(d) and Secs. 20.2053-9(c) and 10(c)	If the executor of a decedent's estate elects to take a deduction for state and foreign death tax imposed upon a transfer for charitable or other uses, the executor must file a written notification to that effect with the IRS before expiration of the period of limitations on assessments (generally three years). (Section 2053 is amended effective for estates of decedents dying after December 31, 2004, to apply only with respect to foreign death taxes).
14. Sec. 2055(e)(3)	A party in interest must commence a judicial proceeding to change an interest into a qualified interest no later than the 90th day after the estate tax return (Form 706) is required to be filed or, if no return is required, the last date for filing the income tax return for the first taxable year of the trust.
15. Sec. 2056(d)	A qualified domestic trust (QDOT) election must be made on Form 706, Schedule M, and the property must be transferred to the trust before the date on which the return is made. Any reformation to determine if a trust is a QDOT requires that the judicial proceeding be commenced on or before the due date for filing the return.
16. Sec. 2056A(b)(2)	The trustee of a QDOT must file a claim for refund of excess tax no later than one year after the date of final determination of the decedent's estate tax liability.
17. Sec. 2057(i)(3)(G)	A qualified heir, with respect to qualified family owned business, has a two-year grace period immediately following the date of the decedent's death in which the failure by the qualified heir to begin using the property in a qualified use will not be considered a cessation of qualified use and therefore will not trigger additional estate tax. (The section 2057 election is not available to estates of decedents dying after December 31, 2004).
18. Sec. 2057(i)(3)(H)	The executor of a decedent's estate has 90 days after notification of incomplete information/signatures to provide the information/signatures to the IRS regarding an election on Form 706 with respect to specially valued property.
19. Sec. 2058(b)	The executor of a decedent's estate may deduct estate, inheritance, legacy, or succession taxes actually paid to any state or the District of Columbia from the decedent's gross estate. With certain exceptions, the deduction is only allowed provided the taxes are actually paid and the deduction claimed within four years of filing Form 706.
20. Sec. 2516	The IRS will treat certain transfers as made for full and adequate consideration in money or money's worth where husband and wife enter into a written agreement relative to their marital and property rights and divorce actually occurs within the 3-year period beginning on the date one year before such agreement is entered into.
21. Sec. 2518(b)	A taxpayer may make a qualified disclaimer no later than nine months after the later of the date of the transfer creating the interest, or the date the taxpayer attains age 21.
22. Sec. 2662(a)	A return with respect to the tax imposed by Subtitle B, Chapter 13 (generation-skipping tax), must be filed for direct skips, on or before the date on which an estate or gift tax return is required to be filed with respect to such transfer, and for all other cases, on or before the 15th day of the fourth month after the close of the taxable year of the person required to make such return in which such transfer occurs.
23. Sec. 2801(b)	With respect to the tax imposed by section 2801 on any covered gift or covered bequest, the tax will be paid by the U.S. recipient of such covered gift or covered bequest.

Statute or Regulation	Act Postponed
24. Sec. 2801(e)	If the trustee of a foreign trust elects to be considered an electing foreign trust, so that the foreign trust is treated as a domestic trust solely for purposes of the section 2801 tax, the trustee must file a timely Form 708 annually either to report and pay the section 2801 tax on all covered gifts and covered bequests received by the trust during the calendar year, or to certify that the electing foreign trust did not receive any covered gifts or covered bequests during the calendar year.
25. Sec. 6035	Any person required to file a return under section 6018 shall furnish to the Secretary and to each person acquiring any interest in property included in the decedent's gross estate for Federal estate tax purposes a statement identifying the value of each interest in such property and such other required information, no later than the earlier of the date which is 30 days after the date on which the return under section 6018 was required to be filed (including extensions, if any) or the date which is 30 days after the date such return is filed. Supplemental filing and statement(s) must be filed by the applicable due date as provided in the regulations.

## SECTION 10. EXEMPT ORGANIZATION ISSUES

Statute or Regulation	Act Postponed
1. Sec. 501(h)	Under section 501(h), certain eligible 501(c)(3) organizations may elect on Form 5768, Election/Revocation of Election by an Eligible Sec. 501(c)(3) Organization to Make Expenditures to Influence Legislation, to have their legislative activities measured solely by expenditures. Form 5768 is effective beginning with a taxable period, provided it is filed before the end of the organization's taxable period.
2. Sec. 501(r)(3)	Under section 501(r)(3), a hospital must conduct a community health needs assessment (CHNA) in the taxable year or in either of the two taxable years immediately preceding the taxable year. Also, the hospital must adopt an implementation strategy to meet the community health needs identified through the CHNA.
3. Sec. 505(c)(1), Sec. 1.505(c)-1T and Sec. 301.9100-2	An organization seeking exemption under 501(c)(9) or section 501(c)(17) must apply for recognition of its exempt status by filing Form 1024, Application for Recognition of Exemption Under Section 501(a). Generally, for the exemption to be recognized for any period before the Form 1024 is filed (i.e., for the organization to be exempt from the date it was organized) the Form 1024 must be filed within 27 months from the end of the month in which the organization was organized.
4. Sec. 506 and Sec. 1.506-1T	An organization described in section 501(c)(4) must electronically file a notice (Form 8976, Notice of Intent to Operate Under Section 501(c)(4)) not later than 60 days after the date on which the organization is organized.
5. Sec. 507(b)(1)(B), Sec. 1.507-2(b)(3), and Sec. 1.507-2(b)(4)	A private foundation terminating its private foundation status by operating as a public charity must notify the IRS of its intent to terminate private foundation status before the beginning of its taxable year and must notify the IRS within 90 days of its completion of the termination.
6. Sec. 508 and Sec. 1.508-1 and Sec. 301.9100-2	An organization seeking exemption under section 501(c)(3) must generally file Form 1023, Application for Recognition of Exemption under section 501(c)(3) of the Internal Revenue Code, or Form 1023-EZ, Streamlined Application for Recognition of Exemption under section 501(c)(3) of the Internal Revenue Code, as a condition for exemption. Generally, for the exemption to be recognized for any period before the Form 1023 or Form 1023-EZ is filed (i.e., for the organization to be exempt from the date it was organized), the Form 1023 or Form 1023-EZ must be filed within 27 months from the end of the month in which the organization was organized.



Statute or Regulation	Act Postponed
7. Rev. Proc. 2017-5, 2017-1 I.R.B. 230, Section 6.08, or any successor revenue procedure	An organization claiming exemption under any subsection in section 501(c), other than section 501(c)(3), (9), (17), or (29), may apply for a determination letter recognizing its exemption. If such an organization seeks recognition of its exemption for any period before its application is filed (i.e., for the organization to receive a determination letter recognizing its exemption from the date it was organized, rather from the date it files its application), it must file an application within 27 months from the end of the month in which it was organized.
8. Sec. 527(i)(2) and Notice 2000-36, 2000-2 C.B. 173	Certain political organizations will not be treated as tax-exempt section 527 organizations unless each such organization electronically files a notice (Form 8871, Political Organization Notice of Section 527 Status) not less than 24 hours after the date on which the organization is established, or, in the case of a material change in the information required, not later than 30 days after such material change.
9. Sec. 527(j)(2) and Notice 2000-41, 2000-2 C.B. 177	Under section 527(j)(2), certain tax-exempt political organizations that accept contributions or make expenditures for an exempt function under section 527 during a calendar year are required to file periodic reports on Form 8872, Political Organization Report of Contributions and Expenditures, beginning with the first month or quarter in which they accept contributions or make expenditures, unless excepted. In addition, tax-exempt political organizations that make contributions or expenditures with respect to an election for federal office may be required to file pre-election reports for that election.
10. Sec. 6033 and Sec. 6072(e) and Sec. 1.6033-2(e)	Annual returns (including Form 990 series) of organizations exempt from tax under section 501(a) (or treated in the same manner as such organizations) must be filed on or before the 15th day of the fifth month following the close of the taxable year. If an organization described in section 501(a) or (i) fails to file a required Form 990 series information return or notice for three consecutive years, the organization's exempt status is considered revoked on and after the date set by the Secretary for the filing of the third annual return or notice.
11. Sec. 6033(g)(1) and Sec. 1.6033-2(e)	Annual information returns, Forms 990, Return of Organization Exempt From Income Tax, of certain tax-exempt political organizations described under section 527 must be filed on or before the 15th day of the fifth month following the close of the taxable year.
12. Sec. 6034 and Sec. 1.6034-1(c)	Annual information returns, Forms 1041-A, U.S. Information Return Trust Accumulation of Charitable Amounts, of trusts claiming charitable or other deductions under section 642(c) must be filed on or before the 15th day of the fourth month following the close of the taxable year of the trust.
13. Rev. Proc. 80-27, 1980-1 C.B. 677, Section 6.01	The central organization of a group ruling is required to report information regarding the status of members of the group annually (at least 90 days before the close of its annual accounting period).

## SECTION 11. EXCISE TAX ISSUES

Statute or Regulation	Act Postponed
1. Sec. 48.4101-1(h)(1)(v)	A registrant must notify the IRS of any change in the information a registrant has submitted within 10 days.
2. Sec. 4101(d) and Sec. 48.4101-2	Each information report under section 4101(d) must be filed by the last day of the first month following the month for which the report is made.
3. Sec. 4221(a)(1) and (b), and Sec. 48.4221-2(c)	A manufacturer is allowed to make a tax-free sale of articles for resale to a second purchaser for use in further manufacture. This rule ceases to apply six months after the earlier of the sale or shipment date unless the manufacturer receives certain proof of resale.
4. Sec. 4221(a)(2) and (b), and Sec. 48.4221-3(c)	A manufacturer is allowed to make a tax-free sale of articles for export or for resale to a second purchaser for export. This rule ceases to apply six months after the earlier of the sale or shipment date unless the manufacturer receives certain proof of export.

Statute or Regulation	Act Postponed
5. Sec. 4221(e)(2)(A) and (B) and Sec. 48.4221-7(c)	A manufacturer is allowed to make a tax-free sale of tires for use by the purchaser in connection with the sale of another article manufactured or produced by the purchaser where such article is sold by the purchaser in a sale that satisfies the requirements of section 4221(a)(2), (3), (4), or (5). This rule ceases to apply six months after the earlier of the sale or shipment date unless the manufacturer receives certain proof of use from the purchaser.

## SECTION 12. INTERNATIONAL ISSUES

Statute or Regulation	Act Postponed
1. Sec. 482 and Sec. 1.482-1(g)(4)(ii)(C)	A claim for a setoff of a section 482 allocation by the IRS must be filed within 30 days of either the date of the IRS's letter transmitting an examination report with notice of the proposed adjustment or the date of a notice of deficiency.
2. Sec. 482 and Sec. 1.482-1(j)(2)	A claim for retroactive application of the final section 482 regulations, otherwise effective only for taxable years beginning after October 6, 1994, must be filed prior to the expiration of the statute of limitations for the year for which retroactive application is sought.
3. Sec. 482 and Sec. 1.482-7(h)(2)(iii)(A)	The form of payment selected for any platform contribution transaction, including, in the case of contingent payments, the contingent base and structure of the payments, must be specified no later than the due date of the applicable tax return (including extensions) for the later of the taxable year of the payor or payee that includes the date of the transaction.
4. Sec. 482 and Sec. 1.482-7(k)(1)(i) and (iii)	A cost sharing arrangement must be recorded in writing in a contract that is contemporaneous with the formation (and any revision) of the arrangement. For this purpose a written contractual agreement is contemporaneous with such formation or revision only if the controlled participants record it, in its entirety, in a document that they sign and date no later than 60 days after the first occurrence of any intangible development cost to which such agreement (or revision) is to apply.
5. Sec. 482 and Sec. 1.482-7(k)(2)(iii)(B)	Each controlled participant in a cost sharing arrangement must provide within 30 days of a request the items described in § 1.482-7(k)(2) and (3). Note that the time for such compliance may be extended at the discretion of the Commissioner.
6. Sec. 482 and Sec. 1.482-7(k)(4)(iii)(A)	Each controlled participant must file its original CSA Statement with the Ogden Campus no later than 90 days after the first occurrence of an intangible development cost to which the newly-formed cost sharing arrangement applies or, in the case of a taxpayer that became a controlled participant after the formation of the arrangement, no later than 90 days after such taxpayer became a controlled participant.
7. Sec. 482 and Sec. 1.482-9(b)(2)(iv) and (6)	The books and records required to be maintained under § 1.482-9(b)(2)(iv) and (6) for as long as costs with respect to covered services are incurred by the renderer must include a statement evidencing the taxpayer's intention to apply the services cost method of § 1.482-9(b) to evaluate the arm's length charge for such services.
8. Sec. 482 and Sec. 1.482-9(b)(7)(ii)(C)(I)	For purposes of a shared services arrangement as described in § 1.482-9(b)(7), the taxpayer must maintain documentation that includes a statement evidencing its intention to apply the services cost method to evaluate the arm's length charge for covered services pursuant to such arrangement.
9. Sec. 482 and Sec. 1.482-9(i)(2)(i)(A)	A contingent-payment arrangement with respect to a controlled service must be set forth in a written contract entered into prior to, or contemporaneous with, the start of the activity or group of activities constituting the controlled service.
10. Sec. 1.882-5(d)(2)(ii)(A)(2)	Liabilities of a foreign corporation that is not a bank must be entered on a set of books at a time reasonably contemporaneous with the time the liabilities are incurred.
11. Sec. 1.882-5(d)(2)(iii)(A)(1)	Liabilities of foreign corporations that are engaged in a banking business must be entered on a set of books relating to an activity that produces ECI before the close of the day on which the liability is incurred.

Statute or Regulation	Act Postponed
12. Sec. 1.884-2T(b)(3)(i)	Requirement that marketable securities be identified on the books of a U.S. trade or business within 30 days of the date an equivalent amount of U.S. assets ceases to be U.S. assets. This requirement applies when a taxpayer has elected to be treated as remaining engaged in a U.S. trade or business for branch profits tax purposes.
13. Sec. 1.884-4(b)(3)(ii)(B)	Requirement that a foreign corporation which identifies liabilities as giving rise to U.S. branch interest, send a statement to the recipients of such interest within two months of the end of the calendar year in which the interest was paid, stating that such interest was U.S. source income (if the corporation did not make a return pursuant to section 6049 with respect to the interest payment).
14. Sec. 1.922-1(i) (Q&A-13)	The quarterly income statements for the first three quarters of the FSC year must be maintained at the FSC's office no later than 90 days after the end of the quarter. The quarterly income statement for the fourth quarter of the FSC year, the final year-end income statement, the year-end balance sheet, and the final invoices (or summaries) or statements of account must be maintained at the FSC's office no later than the due date, including extensions, of the FSC tax return for the applicable taxable year.
15. Sec. 922(a)(1)(E) and Sec. 1.922-1(j) (Q&A-19)	The FSC must appoint a new non-U.S. resident director within 30 days of the date of death, resignation, or removal of the former director, in the event that the sole non-U.S. resident director of a FSC dies, resigns, or is removed.
16. Sec. 924(b)(2)(B) and Sec. 1.924(a)-1T(j)(2)(i)	A taxpayer must execute an agreement regarding unequal apportionment at a time when at least 12 months remain in the period of limitations (including extensions) for assessment of tax with respect to each shareholder of the small FSC in order to apportion unequally among shareholders of a small FSC the \$5 million foreign trading gross receipts used to determine exempt foreign trade income.
17. Sec. 924(c)(2) and Sec. 1.924(c)-1(c)(4)	The FSC must open a new qualifying foreign bank account within 30 days of the date of termination of the original bank account, if a FSC's qualifying foreign bank account terminates during the taxable year due to circumstances beyond the control of the FSC.
18. Sec. 924(c)(3) and Sec. 1.924(c)-1(d)(1)	The FSC must transfer funds from its foreign bank account to its U.S. bank account, equal to the dividends, salaries, or fees disbursed, and such transfer must take place within 12 months of the date of the original disbursement from the U.S. bank account, if dividends, salaries, or fees are disbursed from a FSC's U.S. bank account.
19. Sec. 924(c)(3) and Sec. 1.924(c)-1(d)(2)	The FSC must reimburse from its own bank account any dividends or other expenses that are paid by a related person, on or before the due date (including extensions) of the FSC's tax return for the taxable year to which the reimbursement relates.
20. Sec. 924(c)(3) and Sec. 1.924(c)-1(d)(3)	If the Commissioner determines that the taxpayer acted in good faith, the taxpayer may comply with the reimbursement requirement by reimbursing the funds within 90 days of the date of the Commissioner's determination, notwithstanding a taxpayer's failure to meet the return-filing-date reimbursement deadline in § 1.924(c)-1(d)(2).
21. Sec. 924(e)(4) and Sec. 1.924(e)-1(d)(2)(iii)	If a payment with respect to a transaction is made directly to the FSC or the related supplier in the United States, the funds must be transferred to and received by the FSC bank account outside the United States no later than 35 days after the receipt of good funds (i.e., date of check clearance) on the transaction.
22. Sec. 1.925(a)-1T(e)(4)	A FSC and its related supplier may redetermine a transfer pricing method, the amount of foreign trading gross receipts, and costs and expenses, provided such redetermination occurs before the expiration of the statute of limitations for claims for refund for both the FSC and related supplier, and provided the statute of limitations for assessment applicable to the party that has a deficiency in tax on account of the redetermination is open. See § 1.925(a)-1(c)(8)(i) for time limitations with respect to FSC administrative pricing grouping redeterminations and for a cross-reference to § 1.925(a)-1T(e)(4).



Statute or Regulation	Act Postponed
23. Sec. 927(f)(3)(A) and Sec. 1.927(f)-1(b) (Q&A-12)	A corporation may terminate its election to be treated as a FSC or a small FSC by revoking the election during the first 90 days of the FSC taxable year (other than the first year in which the election is effective) in which the revocation was to take effect.
24. Sec. 927 and Sec. 1.927(a)-1T (d)(2)(i)(B)	A taxpayer may satisfy the destination test with respect to property sold or leased by a seller or lessor if such property is delivered by the seller or lessor (or an agent of the seller or lessor) within the United States to a purchaser or lessee, if the property is ultimately delivered outside the United States (including delivery to a carrier or freight forwarder for delivery outside the United States) by the purchaser or lessee (or a subsequent purchaser or sublessee) within one year after the sale or lease.
25. Sec. 927 and Sec. 1.927(b)-1T(e)(2)(i)	A taxpayer that claims FSC commission deductions must designate the sales, leases, or rentals subject to the FSC commission agreement no later than the due date (as extended) of the tax return of the FSC for the taxable year in which the transaction(s) occurred.
26. Sec. 927 and Sec. 1.927(f)-1(a) (Q&A 4)	A transferee or other recipient of shares in the corporation (other than a shareholder that previously consented to the election) must consent to be bound by the prior election within 90 days of the first day of the FSC's taxable year to preserve the status of a corporation that previously qualified as a FSC or as a small FSC.
27. Sec. 1.964-1T(c)(3)	An election, adoption or change in a method of accounting or tax year on behalf of a CFC or noncontrolled section 902 corporation by its controlling domestic shareholders requires the filing of a statement with the shareholder's return for its year with or within which ends the foreign corporation's taxable year for which the election is made or the method or tax year is adopted or changed, and the filing of a written notice on or before the filing date of the shareholder's return.
28. Sec. 982(c)(2)(A)	Any person to whom a formal document request is mailed shall have the right to bring a proceeding to quash such request not later than the 90th day after the day such request was mailed.
29. Sec. 1.988-1(a)(7)(ii)	An election to have § 1.988-1(a)(2)(iii) apply to regulated futures contracts and nonequity options must be made on or before the first day of the taxable year, or if later, on or before the first day during such taxable year on which the taxpayer holds a contract described in section 988(c)(1)(D)(ii) and § 1.988-1(a)(7)(ii). A late election may be made within 30 days after the time prescribed for the election.
30. Sec. 988(c)(1)(E)(iii)(V) (qualified fund) and Sec. 1.988-1(a)(8)(i)(E)	A qualified fund election must be made on or before the first day of the taxable year, or if later, on or before the first day during such taxable year on which the partnership holds an instrument described in section 988(c)(1)(E)(i).
31. Sec. 1.988-3(b)	An election to treat (under certain circumstances) any gain or loss recognized on a contract described in § 1.988-2(d)(1) as capital gain or loss must be made by clearly identifying such transaction on taxpayer's books and records on the date the transaction is entered into.
32. Sec. 1.988-5(a)(8)(i)	Taxpayer must establish a record, and before the close of the date the hedge is entered into, the taxpayer must enter into the record for each qualified hedging transaction the information contained in § 1.988-5(a)(8)(i)(A) through (E).
33. Sec. 1.988-5(b)(3)(i)	Taxpayer must establish a record and before the close of the date the hedge is entered into, the taxpayer must enter into the record a clear description of the executory contract and the hedge.
34. Sec. 1.988-5(c)(2)	Taxpayer must identify a hedge and underlying stock or security under the rules of § 1.988-5(b)(3).
35. Sec. 992	A corporation that elects IC-DISC treatment (other than in the corporation's first taxable year) must file Form 4876-A, Election To Be Treated as an Interest Charge DISC, with the regional service center during the 90-day period prior to the beginning of the tax year in which the election is to take effect.

Statute or Regulation	Act Postponed
36. Sec. 991 and Sec. 1.991–2(g)(2)	A corporation that filed a tax return as a DISC, but subsequently determines that it does not wish to be treated as a DISC, must notify the Commissioner more than 30 days before the expiration of period of limitations on assessment applicable to the tax year.
37. Sec. 992 and Sec. 1.992–2(a)(1)(i)	A qualifying corporation must file Form 4876–A or attachments thereto, containing the consent of every shareholder of the corporation to be treated as a DISC as of the beginning of the corporation’s first taxable year.
38. Sec. 992 and Sec. 1.992–2(e)(2)	A corporation seeking to revoke a prior election to be treated as a DISC, must file a statement within the first 90 days of the taxable year in which the revocation is to take effect with the service center with which it filed the election or, if the corporation filed an annual information return, by filing the statement at the service center with which it filed its most recent annual information return.
39. Sec. 992 and Sec. 1.992–3(c)(3)	A DISC that makes a deficiency distribution with respect to the 95 percent of gross receipts test or the 95 percent assets test, or both tests, for a particular taxable year, must make such distribution within 90 days of the date of the first written notification from the IRS that the DISC failed to satisfy such test(s).
40. Sec. 993 and Sec. 1.993–3(d)(2)(i)(b)	In certain cases, property may not qualify as export property for DISC purposes unless, among other things, such property is ultimately delivered, directly used, or directly consumed outside the U.S. within one year of the date of sale or lease of the property.
41. Sec. 1445 and Sec. 1.1445–1	Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, must be filed by a buyer or other transferee of a U.S. real property interest, and a corporation, partnership, or fiduciary that is required to withhold tax. The amount withheld is to be transmitted with Form 8288, which is generally to be filed by the 20th day after the date of transfer.
42. Sec. 1446	All partnerships with effectively connected gross income allocable to a foreign partner in any tax year must file forms 8804, Annual Return for Partnership Withholding Tax, and 8805, Foreign Partner’s Information Statement of Section 1446 Withholding Tax, on or before the 15th day of the fourth month following the close of the partnership’s taxable year.
43. Sec. 1446	Form 8813, Partnership Withholding Tax Payment Voucher, is used to pay the withholding tax under section 1446 for all partnerships with effectively connected gross income allocable to a foreign partner in any tax year. Form 8813, Partnership Withholding Tax Payment Voucher (Section 1446), must accompany each payment of section 1446 tax made during the partnership’s taxable year. Form 8813 is to be filed on or before the 15th day of the fourth, sixth, ninth, and 12th months of the partnership’s taxable year for U.S. income tax purposes.
44. Sec. 6038A(e)(1) and Sec. 1.6038A–5(b)	A reporting corporation must furnish an authorization of agent within 30 days of a request by the IRS to avoid a penalty.
45. Sec. 6038A(e)(4)(A)	A reporting corporation must commence any proceeding to quash a summons filed by the IRS in connection with an information request within 90 days of the date the summons is issued.
46. Sec. 6038A(e)(4)(B)	A reporting corporation must commence any proceeding to review the IRS’s determination of noncompliance with a summons within 90 days of the IRS’s notice of noncompliance.
47. Secs. 6038, 6038B, and 6046A	The filing of Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships, for those taxpayers who do not have to file an income tax return. The form is due at the time that an income tax return would have been due had the taxpayer been required to file an income tax return or at the time any required information return is due.
48. Sec. 6038D and Sec. 1.6038D–2T	A specified person that has any interest in a specified foreign financial asset during the taxable year must attach Form 8938, “Statement of Specified Foreign Financial Assets,” to that specified person’s annual return for the taxable year to report the information required by section 6038D and § 1.6038D–4T if the aggregate value of all such assets exceeds the applicable threshold.

Statute or Regulation	Act Postponed
49. Secs. 6039F and 6048	Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts must be filed by the due date of the U.S. person's income tax return, including extensions.
50. Sec. 6662(e) and Sec. 1.6662-6(d)(2)(iii)(A)	A taxpayer must provide, within 30 days of a request by the IRS, specified "principal documents" regarding the taxpayer's selection and application of transfer pricing method to avoid potential penalties in the event of a final transfer pricing adjustment by the IRS. See also § 1.6662-6(d)(2)(iii)(C) (similar requirement re: background documents).

### SECTION 13. PARTNERSHIP AND S CORPORATION ISSUES

Statute or Regulation	Act Postponed
1. Secs. 1.442-1(b)(1) and (3) and 1.706-1(b)(8)	A partnership may obtain approval of the Commissioner to adopt, change or retain an annual accounting period by filing Form 1128, Application to Adopt, Change, or Retain a Tax Year, within such time as provided in administrative procedures published by the Commissioner. See Rev. Procs. 2006-46, 2006-2 C.B. 859, and 2002-39, 2002-1 C.B. 1046.
2. Sec. 1.743-1(k)(2)	A transferee that acquires, by sale or exchange, an interest in a partnership with an election under section 754 in effect for the taxable year of the transfer, must notify the partnership, in writing, within 30 days of the sale or exchange. A transferee that acquires, on the death of a partner, an interest in a partnership with an election under section 754 in effect for the taxable year of the transfer, must notify the partnership, in writing, within one year of the death of the deceased partner.
3. Sec. 1.754-1(c)(1)	Generally, a partnership may revoke a section 754 election by filing the revocation no later than 30 days after the close of the partnership taxable year with respect to which the revocation is intended to take effect.
4. Sec. 1.761-2(b)(3)	A partnership may generally elect to be excluded from subchapter K. The election will be effective unless within 90 days after the formation of the organization any member of the organization notifies the Commissioner that the member desires subchapter K to apply to such organization and also advises the Commissioner that he has so notified all other members of the organization. In addition, an application to revoke an election to be excluded from subchapter K must be submitted no later than 30 days after the beginning of the first taxable year to which the revocation is to apply.
5. Sec. 1.761-2(c)	A partnership requesting permission to be excluded from certain provisions of subchapter K must submit the request to the Commissioner no later than 90 days after the beginning of the first taxable year for which partial exclusion is desired.
6. Sec. 1361(e)	In general, the trustee of the electing small business trust (ESBT) must file the ESBT election within the two-month and 16-day period beginning on the day the stock is transferred to the trust. See § 1.1361-1(m)(2)(ii).
7. Sec. 1.1361-1(j)(6)	The current income beneficiary of a qualified subchapter S trust (QSST) must make a QSST election within the 2-month and 16-day period from one of the dates prescribed in § 1.1361-1(j)(6)(iii).
8. Sec. 1.1361-1(j)(10)	The successive income beneficiary of a QSST may affirmatively refuse to consent to the QSST election. The beneficiary must sign the statement and file the statement with the IRS within 15 days and two months after the date on which the successive income beneficiary becomes the income beneficiary.
9. Sec. 1.1361-3(a)(4)	If an S corporation elects to treat an eligible subsidiary as a qualified subchapter S subsidiary (QSUB), the election cannot be effective more than two months and 15 days prior to the date of filing the election.
10. Sec. 1.1361-3(b)(2)	An S corporation may revoke a QSUB election by filing a statement with the service center. The effective date of a revocation of a QSUB election cannot be more than two months and 15 days prior to the filing date of the revocation.



Statute or Regulation	Act Postponed
11. Sec. 1.1362-2(a)(2), (4)	If a corporation revokes its subchapter S election after the first 2 1/2 months of its taxable year, the revocation will not be effective until the following taxable year. An S corporation may rescind a revocation of an S election at any time before the revocation becomes effective.
12. Sec. 1362(b)(1)	An election under section 1362(a) to be an S corporation may be made by a small business corporation for any taxable year at any time during the preceding taxable year, or at any time during the taxable year and on or before the 15th day of the third month of the taxable year.
13. Rev. Proc. 2003-43, 2003-1 C.B. 998	This revenue procedure provides a simplified method for taxpayers requesting relief for late S corporation elections, Qualified Subchapter S Subsidiary (QSUB) elections, Qualified Subchapter S Trust (QSST) elections, and Electing Small Business Trust (ESBT) elections. Generally, this revenue procedure provides that certain eligible entities may file late elections within 24 months of the due date of the election.
14. Rev. Proc. 2004-48, 2004-2 C.B. 172	This revenue procedure provides a simplified method for taxpayers to request relief for a late S corporation election and a late corporate classification election which was intended to be effective on the same date that the S corporation election was intended to be effective. This revenue procedure provides that within six months after the due date for the tax return, excluding extensions, for the first year the entity intended to be an S corporation, the corporation must file a properly completed Form 2553, Election by a Small Business Corporation, with the applicable service center.
15. Sec. 1378(b) and Sec. 1.1378-1(c)	An S or electing S corporation may obtain the approval of the Commissioner to adopt, change or retain an annual accounting period by filing Form 1128, Application to Adopt, Change, or Retain a Tax Year, within such time as is provided in administrative procedures published by the Commissioner. See Rev. Procs. 2006-46 and 2002-39.

## SECTION 14. PROCEDURE & ADMINISTRATION ISSUES

### .01 Bankruptcy and Collection

Statute or Regulation	Act Postponed
1. Secs. 301.6036-1(a)(2) and (3)	A court-appointed receiver or fiduciary in a non-bankruptcy receivership, a fiduciary in aid of foreclosure who takes possession of substantially all of the debtor's assets, or an assignee for benefit of creditors, must give written notice within ten days of his appointment to the IRS as to where the debtor will file his tax return.
2. Sec. 6320(a)(3)(B) and (c) and Secs. 301.6320-1(b), (c), (f) and (i)	A taxpayer must request a Collection Due Process (CDP) administrative hearing within 30 calendar days beginning on the day after the five business day period after the filing of a notice of federal tax lien (NFTL) by the IRS. After issuance of a determination at the CDP hearing, the taxpayer may appeal this determination within 30 days to the United States Tax Court. A taxpayer who does not make a timely request for a CDP hearing may request an "equivalent hearing" with Appeals within the one-year period commencing the day after the end of the five business day period following the filing of the NFTL.
3. Sec. 6330(a)(3)(B) and (d)(1) and Sec. 301.6330-1(b), (c), (f) and (i)	The taxpayer must request a CDP administrative hearing within 30 calendar days after the IRS sends a notice of proposed levy. After issuance of a determination at the CDP hearing, the taxpayer may appeal this determination within 30 days to the United States Tax Court. A taxpayer who does not make a timely request for a CDP hearing may request an "equivalent hearing" with Appeals within the one-year period commencing the day after the date of the CDP Notice issued under section 6330.
4. Sec. 6331(k)(1) and Sec. 301.7122-1(g)(2)	If a taxpayer submits a good-faith revision of a rejected offer in compromise within 30 days after the rejection, the IRS will not levy to collect the liability before deciding whether to accept the revised offer.

Statute or Regulation	Act Postponed
5. Sec. 6331(k)(2) and Sec. 301.6331-4(a)(1)	If, within 30 days following the rejection or termination of an installment agreement, the taxpayer files an appeal with the IRS Office of Appeals, no levy may be made while the rejection or termination is being considered by Appeals.
6. Sec. 6337(b) and Sec. 301.6337-1(b)	The owners of real property, their heirs or successors, or any person having an interest in real property sold by the IRS under section 6335 have 180 days from the date of the sale to redeem such property.
7. Sec. 301.6343-1(c) and Sec. 6343(b) and (d)	A taxpayer must request a release of a levy more than five days prior to a scheduled sale of the property to which the levy relates. A taxpayer or third-party has two years from the levy to request return of money levied upon or received from the sale of levied property by the IRS.
8. Rev. Proc. 2005-34, 2005-1 C.B. 1233, Sec. 4.01	If the IRS determines that a taxpayer is liable for the trust fund recovery penalty under section 6672, the IRS will provide the taxpayer an opportunity to dispute the proposed assessment by appealing the proposed assessment within 60 days of the date on the notice (75 days if the notice is addressed to the taxpayer outside of the United States).
9. Sec. 7122(d)(2) and Sec. 301.7122-1(f)(5)(i)	A taxpayer must request administrative review of a rejected offer in compromise within 30 days after the date on the letter of rejection.

#### .02 Information Returns

Statute or Regulation	Act Postponed
1. Sec. 6045A	Requires a broker transferring securities to another broker to provide certain information (such as basis) to the receiving broker within 15 days.
2. Sec. 6045B	Requires reporting by a securities issuer of actions that affect a shareholder's basis in the securities within 45 days of the action, or if earlier, by January 15 of the following year. Statements must be provided to the shareholder by January 31 of the following year. Only the 45-day deadline in section 6045B(b)(1) would be extended, but not beyond January 15 of the following year. The January 15 deadline will not be extended under this revenue procedure as such information is needed for broker reporting (Form 1099-B) to allow shareholders to file their income tax returns timely.
3. Sec. 6050I	Any person engaged in a trade or business receiving more than \$10,000 cash in one transaction (or two or more related transactions) must file an information return, Form 8300, Report of Cash Payments over \$10,000 Received in a Trade or Business, by the 15th day after the date the cash was received. Additionally, a statement must be provided to the person with respect to whom the information is required to be furnished by January 31 of the year following.
4. Sec. 6050K and Sec. 1.6050K-1(f)(2)	A partnership notified of an exchange after the partnership has filed its Form 1065 for the taxable year with respect to which the exchange should have been reported shall file its Form 8308 with the service center where its Form 1065 was filed on or before the 30th day after the partnership is notified of the exchange.
5. Sec. 6050L	Returns relating to certain dispositions of donated property, Forms 8282, Donee Information Return, must be filed within 125 days of the disposition.

#### .03 Miscellaneous

Statute or Regulation	Act Postponed
1. Sec. 1314(b)	A taxpayer may file a claim for refund or credit of tax based upon the mitigation provisions of sections 1311 through 1314 if, as of the date a determination (as defined in section 1313(a)) is made, one year remains before the period for filing a claim for refund expires.
2. Sec. 6015(b) and (c)	A requesting spouse must request relief under section 6015(b) or (c) within two years of the first collection activity against the requesting spouse.

Statute or Regulation	Act Postponed
3. Sec. 6015(e)	A requesting spouse may petition the United States Tax Court to determine the appropriate relief under this section if such petition is filed not later than the close of the 90th day after the IRS mails, by certified or registered mail, notice of the IRS's final determination of relief available to the individual.
4. Sec. 6110(f)	A person to whom a written determination pertains or other person described in section 6110(f)(3)(A)(i) may petition the United States Tax Court within a specified period for a determination with respect to that portion of the written determination or background file document that the IRS has mailed a notice of intention to disclose for public inspection.
5. Secs. 6226 (pre-2018) and 6234 (post-2017)	A taxpayer or partnership may file a petition for readjustment of partnership items or adjustments within a specified period with the United States Tax Court, United States Court of Federal Claims, or United States District Court.
6. Sec. 6404(h)	A taxpayer has 180 days after the IRS's mailing of a notice of determination denying a request for interest abatement to petition the United States Tax Court for review of the determination.
7. Sec. 6411 and Sec. 1.6411-1(c)	Taxpayers applying for a tentative carryback adjustment of the tax for the prior taxable year must file Form 1139, Corporation Application for Tentative Refund, (for corporations) or Form 1045, Application for Tentative Refund, (for entities other than corporations) within 12 months after the end of such taxable year that generates such net operating loss, net capital loss, or unused business credit from which the carryback results.
8. Sec. 6656(e)(2)	A taxpayer who is required to deposit taxes and fails to do so is subject to a penalty under section 6656. Under section 6656(e)(2), the taxpayer may, within 90 days of the date of the penalty notice, designate to which deposit period within a specified tax period the deposits should be applied.
9. Sec. 7428	An organization may file, within a specified period, a petition for declaratory judgment with the United States Tax Court involving the IRS's determination, or failure to make a determination, with respect to the organization's initial or continuing qualification or classification as an exempt organization under section 501(c)(3), a private foundation under section 509(a), a private operating foundation under section 4942(j)(3), a cooperative under section 521(b), or other organization under section 501(c) or (d) and exempt from tax under section 501(a).
10. Sec. 7430(f)	A taxpayer may file a petition with the United States Tax Court within a specified period for review of a decision by the IRS granting or denying in whole or in part an award for reasonable administrative costs under section 7430(a).
11. Sec. 7436	A person for whom services are performed may file a petition for determination of employment status with the United States Tax Court within a specified period if the IRS determines that one or more individuals performing services for such person are employees for purposes of Subtitle C, or that such person is not entitled to treatment under section 530(a) of the Revenue Act of 1978.
12. Sec. 7476	An employer, plan administrator or employee who is an interested party under the regulations may file, within a specified period, a petition for declaratory judgment with the United States Tax Court involving the IRS's determination, or a failure to make a determination, with respect to the initial qualification or a continuing qualification of a qualified retirement plan.
13. Sec. 7477 and Secs. 301.7477-1(d)(4)(ii) and (5)	The donor (or such qualified representative) must timely request consideration by Appeals through a written request made within 30 days after the mailing date of the Letter 950-G, or by such later date for responding to the Letter 950-G as is agreed to between the donor and the IRS. A petition with the United States Tax Court requesting a declaratory judgment under section 7477 must be filed with the United States Tax Court before the 91 <sup>st</sup> day after the date of mailing of the Letter 3569 issued by the IRS to the donor.



Statute or Regulation	Act Postponed
14. Sec. 7478	A prospective issuer of certain governmental obligations can file, within a specified period, a petition for declaratory judgment with the United States Tax Court if the IRS determines that the interest on the obligations will not be excludable from gross income under section 103 or if the IRS fails to make a determination with respect to the excludability of the interest.
15. Sec. 7479	A decedent's estate has 90 days after the IRS's mailing of a notice of determination about whether a section 6166 extension to pay estate tax may be made or whether the extension has ceased to apply to file a petition with the United States Tax Court seeking a declaration about the determination. The estate must exhaust administrative remedies before filing a petition, but administrative remedies are deemed exhausted if the IRS has not issued a determination within 180 days after the request for determination and during that time period the estate took reasonable steps, in a timely manner, to secure such determination.
16. Sec. 7481(c)	A taxpayer may file a motion with the United States Tax Court within a specified period for a redetermination of whether the taxpayer has made an overpayment of interest or the IRS has made an underpayment of interest on the deficiency or overpayment determined by the United States Tax Court.
17. Sec. 7623(b)	An individual claiming a whistleblower award based on information provided to the IRS may appeal a determination regarding an award to the United States Tax Court within a specified period.
18. Sec. 7705, Rev. Procs. 2016-33 and 2017-14, and Notice 2016-49	Periodic bonding, financial review, reporting, and verification requirements must be satisfied to become or remain certified as a certified professional employer organization (CPEO). In addition, responsible individuals of a CPEO must meet periodic reporting requirements.

## SECTION 15. TAX CREDIT ISSUES

Statute or Regulation	Act Postponed
1. Sec. 42(e)(3)(A)(ii)	A taxpayer has a 24-month measuring period in which the requisite amount of rehabilitation expenditures has to be incurred in order to qualify for treatment as a separate new building.
2. Sec. 1.42-5(c)(1)	The taxpayer must make certain certifications at least annually to the Agency.
3. Sec. 1.42-5(c)(1)(iii)	The taxpayer must receive an annual income certification from each low-income tenant with documentation to support the certification.
4. Sec. 1.42-8(a)(3)(v)	The taxpayer and an Agency may elect to use an appropriate percentage under section 42(b)(2)(A)(ii)(I) by notarizing a binding agreement by the fifth day following the end of the month in which the binding agreement was made.
5. Sec. 1.42-8(b) (1)(vii)	The taxpayer and an Agency may elect an appropriate percentage under section 42(b)(2)(A)(ii)(II) by notarizing a binding agreement by the fifth day following the end of the month in which the tax-exempt bonds are issued.
6. Sec. 42(d)(2)(D)(i)(IV)	In order to claim section 42 credits on an existing building, section 42(d)(2)(B)(ii) requires that the building must have been placed in service at least ten years before the date the building was acquired by the taxpayer. A building is not considered placed in service for purposes of section 42(d)(2)(B)(ii) if the building is resold within a 12-month period after acquisition by foreclosure of any purchase-money security interest.
7. Sec. 42(g)(3)(A)	A building shall be treated as a qualified low-income building only if the project meets the minimum set aside requirement by the close of the first year of the credit period of the building.
8. Sec. 42(h)(6)(J)	A low-income housing agreement commitment must be in effect as of the beginning of the year for a building to receive credit. If such a commitment was not in effect, the taxpayer has a one-year period for correcting the failure.
9. Sec. 42(h)(1)(E) and (F)	The taxpayer's basis in the building project, as of the date which is one year after the date that the allocation was made, must be more than 10 percent of the taxpayer's reasonably expected basis in the project.

Statute or Regulation	Act Postponed
10. Sec. 47(c)(1)(C) and Sec. 1.48-12(b)(2)	A taxpayer has a 24- or 60-month measuring period in which the requisite amount of rehabilitation expenditures have to be incurred in order to satisfy the “substantial rehabilitation” test.
11. Sec. 1.48-12(d)(7)	In the historic rehabilitation context, if the taxpayer fails to receive final certification of completed work prior to the date that is 30 months after the date that the taxpayer filed the return on which the credit is claimed, the taxpayer must, prior to the last day of the 30th month, consent to extending the statute of limitations by submitting a written statement to the IRS.
12. Sec. 51(d)(13)(A)(ii)(II)	An employer seeking the Work Opportunity Credit with respect to an individual must submit Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity Credit, to the State Employment Security Agency (State Workforce Agency) not later than the 28th day after the individual begins work for the employer.

### SECTION 16. TAX-EXEMPT BOND ISSUES

Statute or Regulation	Act Postponed
1. Sec. 1.25-4T(c)	On or before the date of distribution of mortgage credit certificates under a program, the issuer must file an election not to issue an amount of qualified mortgage bonds. An election may be revoked, in whole or in part, at any time during the calendar year in which the election was made.
2. Secs. 1.141-12(d)(4), 1.142-2(c)(2), and 1.1397E-1(h)(8)(ii)(C)(3)	An issuer must provide notice to the Commissioner of the establishment of a defeasance escrow within 90 days of the date such defeasance escrow is established in accordance with §§ 1.141-12(d)(1), 1.142-2(c)(1) or 1.1397E-1(h)(8)(ii)(B)(1)(ii).
3. Sec. 142(d)(7)	An operator of a multi-family housing project for which an election was made under section 142(d) must submit to the Secretary an annual certification as to whether such project continues to meet the requirements of section 142(d).
4. Sec. 142(f)(4) and Sec. 1.142(f)(4)-1	A person engaged in the local furnishing of electric energy or gas that uses facilities financed with exempt facility bonds under section 142(a)(8) and that expands its service area in a manner inconsistent with the requirements of sections 142(a)(8) and 142(f) may make an election to ensure that those bonds will continue to be treated as exempt facility bonds. The election must be filed with the IRS on or before 90 days after the date of the service area expansion that causes the bonds to cease to meet the applicable requirements.
5. Sec. 146(f) and Notice 89-12, 1989-1 C.B. 633	If an issuing authority’s volume cap for any calendar year exceeds the aggregate amount of tax-exempt private activity bonds issued during such calendar year by such authority, such authority may elect to treat all (or any portion) of such excess as a carryforward for one or more carryforward purposes. Such election must be filed by the earlier of (1) February 15 of the calendar year following the year in which the excess amount arises, or (2) the date of issue of bonds issued pursuant to the carryforward election.
6. Sec. 148(f)(3) and Sec. 1.148-3(g)	An issuer of a tax-exempt bond must make any required rebate payment no later than 60 days after the computation date to which the payment relates. A rebate payment is paid when it is filed with the IRS at the place or places designated by the Commissioner. A payment must be accompanied by the form provided by the Commissioner for this purpose.
7. Sec. 1.148-5(c)	An issuer of a tax-exempt bond must make a yield reduction payment at the same time and in the same manner as rebate amounts are required to be paid under § 1.148-3. Under § 1.148-3(g), an issuer of a tax-exempt bond must make any required rebate payment no later than 60 days after the computation date to which the payment relates.
8. Sec. 148(f)(4)(C)(vii) and Sec. 1.148-7(k)(1)	An issuer of a tax-exempt bond that elects to pay certain penalties in lieu of rebate must make any required penalty payments not later than 90 days after the period to which the penalty relates.

Statute or Regulation

9. Sec. 149(e)

Act Postponed

An issuer of a tax-exempt bond must submit to the Secretary a statement providing certain information regarding the bond not later than the 15th day of the second calendar month after the close of the calendar quarter in which the bond is issued.

**SECTION 17. SPECIAL RULES FOR SECTION 1031 LIKE-KIND EXCHANGE TRANSACTIONS**

.01 Taxpayers are provided the relief described in this section if an IRS News Release or other guidance provides relief for acts listed in this revenue procedure (unless the news release or other guidance specifies otherwise).

.02 (1) The last day of a 45-day identification period set forth in § 1.1031(k)-1(b)(2)(i) of the Income Tax Regulations, the last day of a 180-day exchange period set forth in § 1.1031(k)-1(b)(2)(ii), and the last day of a period set forth in section 4.02(3) through (6) of Rev. Proc. 2000-37, 2000-2 C.B. 308, modified by Rev. Proc. 2004-51, 2004-2 C.B. 294, that fall on or after the date of a federally declared disaster, are postponed by 120 days or to the last day of the general disaster extension period authorized by an IRS News Release or other guidance announcing tax relief for victims of the specific federally declared disaster, whichever is later. However, in no event may a postponement period extend beyond: (a) the due date (including extensions) of the taxpayer's tax return for the year of the transfer (See § 1.1031(k)-1(b)(2)(ii)); or (b) one year (See section 7508A(a)).

(2) A taxpayer who is a transferor qualifies for a postponement under this section only if-

(a) The relinquished property was transferred on or before the date of the federally declared disaster, or in a transaction governed by Rev. Proc. 2000-37, modified by Rev. Proc. 2004-51, qualified indicia of ownership were transferred to the exchange accommodation titleholder on or before that date; and

(b) The taxpayer (transferor)-

(i) Is an "affected taxpayer" as defined in the IRS News Release or other guidance announcing tax relief for the victims of the specific federally declared disaster; or

(ii) Has difficulty meeting the 45-day identification period or 180-day exchange period deadline set forth in § 1.1031(k)-

1(b)(2), or a deadline set forth in section 4.02(3) through (6) of Rev. Proc. 2000-37, modified by Rev. Proc. 2004-51, due to the federally declared disaster for the following or similar reasons:

(A) The relinquished property or the replacement property is located in a covered disaster area (as defined in § 301.7508A-1(d)(2)) as provided in the IRS News Release or other guidance (the covered disaster area);

(B) The principal place of business of any party to the transaction (for example, a qualified intermediary, exchange accommodation titleholder, transferee, settlement attorney, lender, financial institution, or a title insurance company) is located in the covered disaster area;

(C) Any party to the transaction (or an employee of such a party who is involved in the section 1031 transaction) is killed, injured, or missing as a result of the federally declared disaster;

(D) A document prepared in connection with the exchange (for example, the agreement between the transferor and the qualified intermediary or the deed to the relinquished property or replacement property) or a relevant land record is destroyed, damaged, or lost as a result of the federally declared disaster;

(E) A lender decides not to fund either permanently or temporarily a real estate closing due to the federally declared disaster or refuses to fund a loan to the taxpayer because flood, disaster, or other hazard insurance is not available due to the federally declared disaster; or

(F) A title insurance company is not able to provide the required title insurance policy necessary to settle or close a real estate transaction due to the federally declared disaster.

.03 The postponement described in this section also applies to the last day of a 45-day identification period described in § 1.1031(k)-1(b)(2)(i) and the last day of a 45-day identification period described in section 4.05(4) of Rev. Proc. 2000-37, modified by Rev. Proc. 2004-51, that fall prior to the date of a federally declared disaster if an identified replacement prop-

erty (in the case of an exchange described in § 1.1031(k)-1), or an identified relinquished property (in the case of an exchange described in Rev. Proc. 2000-37, modified by Rev. Proc. 2004-51) is substantially damaged by the federally declared disaster.

.04 If the taxpayer (transferor) qualifies for relief under this section for any reason other than section 17.02(2)(b)(i) of this revenue procedure, then such taxpayer is not considered an affected taxpayer for purposes of any other act listed in this revenue procedure or for any acts listed in an IRS News Release or other published guidance related to the specific federally declared disaster.

**SECTION 18. INQUIRIES**

If you wish to recommend that other acts qualify for postponement, please write to the Office of Associate Chief Counsel, Procedure and Administration CC:PA:B7, 1111 Constitution Avenue, NW, Washington, DC 20224. Please mark "7508A List" on the envelope. In the alternative, e-mail your comments to: Notice.Comments@irscounsel.treas.gov, and refer to Rev. Proc. 2018-58 in the Subject heading.

**SECTION 19. EFFECT ON OTHER REVENUE PROCEDURES**

Rev. Proc. 2007-56, 2007-2 C.B. 388, is superseded.

**SECTION 20. EFFECTIVE DATE**

This revenue procedure is effective for acts that may be performed or disasters which occur on or after November 20, 2018.

**SECTION 21. DRAFTING INFORMATION**

The principal author of this revenue procedure is Andrew Keaton in Branch 6, of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding section 1031 like-kind exchange postponements under section



17 of this revenue procedure contact Lisa Mojiri-Azad or Edward Schwartz of the Office of Associate Chief Counsel (Income Tax and Accounting) at (202) 317-4718 (not a toll-free call) or (202) 317-7006 (not a toll-free number), respectively. For further information regarding other sections of this revenue procedure contact Mr. Keaton at (202) 317-5404 (not a toll-free number).

26 CFR 601.601. Rules and regulations.  
(Also Part I, § 163(j).)

## Rev. Proc. 2018–59

### SECTION 1. PURPOSE

This revenue procedure provides a safe harbor that allows taxpayers to treat certain infrastructure trades or businesses as real property trades or businesses solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) of the Internal Revenue Code.

### SECTION 2. BACKGROUND

.01 On December 22, 2017, section 163(j) was amended by the Tax Cuts and Jobs Act, Pub. L. 115–97 (TCJA). Section 163(j), as amended by the TCJA, provides new rules limiting the amount of business interest expense that can be deducted for taxable years beginning after December 31, 2017. See TCJA § 13301(a).

.02 Under section 163(j)(1), the amount allowed as a deduction for business interest expense is limited to the sum of: (1) the taxpayer’s business interest income (as defined in section 163(j)(6)) for the taxable year; (2) 30 percent of the taxpayer’s adjusted taxable income (as defined in section 163(j)(8)) for such taxable year; and (3) the taxpayer’s floor plan financing interest (as defined in section 163(j)(9)) for such taxable year.

.03 The limitation under section 163(j) on the deductibility of business interest expense applies to all taxpayers with business interest (as defined in section 163(j)(5)), except for certain taxpayers (other than tax shelters under section 448(a)(3)) that meet the gross receipts test in section 448(c).

.04 Section 163(j)(5) generally provides that the term “business interest” means any interest properly allocable to a trade or business. Section 163(j)(7)(A)(ii)

provides that, for purposes of the limitation on the deduction for business interest, the term “trade or business” does not include an “electing real property trade or business.” Thus, for purposes of section 163(j), interest expense that is properly allocable to an electing real property trade or business is not properly allocable to a trade or business, and is not business interest expense that is subject to section 163(j)(1).

.05 The term “electing real property trade or business” under section 163(j)(7)(B) means any trade or business that is described in section 469(c)(7)(C) that makes an election to be an electing real property trade or business.

.06 Section 168(g)(1)(F) provides that an electing real property trade or business (within the meaning of section 163(j)(7)(B)) must use the alternative depreciation system for property described in section 168(g)(8). See section 163(j)(10)(A).

.07 Section 469(c)(7)(C) defines a real property trade or business as any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.

.08 The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are aware that there may be uncertainty as to whether certain infrastructure arrangements between private persons and governmental entities under which private persons maintain or provide other services with respect to core infrastructure property such as roads, bridges, or other similar property are included in the definition of a real property trade or business under section 469(c)(7)(C).

.09 In light of the concerns relating to certain infrastructure arrangements in the context of section 163(j), this revenue procedure provides a safe harbor that allows taxpayers to treat certain trades or businesses that are conducted in connection with the designing, building, managing, operating, or maintaining of certain core infrastructure projects as real property trades or businesses for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) (infrastructure safe harbor).

.10 The infrastructure safe harbor in this revenue procedure is based on the proposed

eligibility parameters for public infrastructure projects for purposes of the private activity bond financing proposals described in the “Legislative Outline for Rebuilding Infrastructure in America,” which the White House released publicly and transmitted to Congress on February 12, 2018. See <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf> (last visited Oct. 17, 2018).

### SECTION 3. SCOPE AND INFRASTRUCTURE SAFE HARBOR

.01 *Scope.* This revenue procedure applies to a taxpayer with a trade or business that—

(1) Is conducted by a party contractually obligated to fulfill the terms of a specified infrastructure arrangement, as defined in section 4.11 of this revenue procedure;

(2) Is conducted in connection with fulfilling the terms of a specified infrastructure arrangement; and

(3) Would not otherwise be treated as a real property trade or business under section 163(j)(7)(B) or 469(c)(7)(C).

.02 *Safe harbor for certain infrastructure trades or businesses.* Taxpayers described in section 3.01 of this revenue procedure are eligible to make an election to be an electing real property trade or business for purposes of sections 163(j)(7)(B) and 168(g)(1)(F). If a taxpayer makes this election, the taxpayer must use the alternative depreciation system of section 168(g) to depreciate the property described in section 168(g)(8). The taxpayer makes the election in accordance with the time and in such form and manner as prescribed by the Commissioner in regulations, guidance published in the Internal Revenue Bulletin, or in IRS forms, instructions, or publications.

.03 *Treatment as real property.* For purposes of applying section 163(j) and this revenue procedure, a “specified infrastructure arrangement,” as defined in section 4.11 of this revenue procedure, is treated as real property.

.04 *Special rule for certain assets.* For purposes of applying section 163(j) and this revenue procedure, “qualified public infrastructure property,” as defined in section 4.08 of this revenue procedure, is treated as used in a trade or business described in section 3.01 of this revenue procedure even if such property is being de-

signed, built, constructed, reconstructed, developed, or redeveloped.

.05 *No inference.* No inference should be drawn from this revenue procedure regarding the definition of a real property trade or business for purposes of section 469.

#### **SECTION 4. DEFINITIONS FOR THE INFRASTRUCTURE SAFE HARBOR**

The following definitions apply for purposes of this revenue procedure:

.01 The term “Brownfield site” means any real property the use of which may be complicated by the presence of or potential presence of a hazardous substance, pollutant, or contaminant.

.02 The term “environmental remediation costs” means costs chargeable to a capital account that are paid or incurred to control or abate hazardous substances.

.03 The term “flood control and stormwater facilities” means any capital assets used to control floodwater or to contain stormwater.

.04 The term “government” means—

(1) The United States or any agency or instrumentality of the United States;

(2) A State or any political subdivision thereof, including the District of Columbia and any possession or territory of the United States, within the meaning of section 103 and § 1.103-1; or

(3) Any foreign government.

.05 The term “foreign government” means any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one of the foregoing within the meaning of § 1.1471-6(b).

.06 The term “hydroelectric generating facilities” means facilities used to generate electricity from water, including water impounded through a dam or diverted from a river, or pumped storage, and structures for housing generating equipment, up to, but not including, the stage of electrical transmission.

.07 The term “infrastructure property” means—

(1) Airports, within the meaning of section 142;

(2) Docks, and wharves, within the meaning of section 142;

(3) Maritime and inland waterway ports, and waterway infrastructure, including dredging and navigation improvements;

(4) Mass commuting facilities, within the meaning of section 142;

(5) Facilities for the furnishing of water, within the meaning of section 142;

(6) Sewage facilities, within the meaning of section 142;

(7) Solid waste disposal facilities, within the meaning of section 142;

(8) Facilities for the local furnishing of electrical energy or gas, within the meaning of section 142;

(9) Local district heating or cooling facilities, within the meaning of section 142;

(10) Qualified hazardous waste facilities, within the meaning of section 142;

(11) High-speed intercity rail facilities, within the meaning of section 142;

(12) Hydroelectric generating facilities, together with environmental enhancements of hydroelectric generating facilities, within the meaning of section 142;

(13) Qualified public educational facilities, within the meaning of section 142;

(14) Flood control and stormwater facilities;

(15) Surface transportation facilities;

(16) Rural broadband service facilities; and

(17) Environmental remediation costs on Brownfield and Superfund sites.

.08 The term “qualified public infrastructure property” means infrastructure property if—

(1) The infrastructure property either—

(a) Is owned by a government; or

(b) Is not property of a trade or business described in section 163(j)(7)(A)(iv) and is owned by a private trade or business that operates under an arrangement in which rates charged for the use or services provided by the infrastructure property are subject to regulatory or contractual control by a government, or government approval; and

(2) The infrastructure property is, or will be once operational, available for use by the general public or the services provided by the infrastructure property are made available to members of the general public, including electric utility, industrial, agricultural, or commercial users on the same basis as individual members of the general public.

.09 The term “rural area” means, as confirmed by the latest decennial census of the U.S. Census Bureau, (a) any area that is not located within a city, town, or incorporated area that has a population of

greater than 20,000 inhabitants or (b) an urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

.10 The term “rural broadband service facilities” means broadband telecommunications assets that provide high-speed internet access for data transmission through wired or wireless networks and that primarily serve any rural area.

.11 The term “specified infrastructure arrangement” means a contract or contracts with a term in excess of 5 years between a government and a private trade or business under which a private trade or business has contractual responsibility to provide one or more of the functions of designing, building, constructing, reconstructing, developing, redeveloping, managing, operating, or maintaining qualified public infrastructure property.

.12 The term “Superfund site” means any site designated by the Environmental Protection Agency as a Superfund site on its national priorities list under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law 96-510 (94 Stat. 2767 (1980)), as amended.

.13 The term “surface transportation facilities” includes any road, bridge, tunnel, passenger railroad, surface freight transfer facility, and any other facility that facilitates surface transportation.

#### **SECTION 5. EFFECTIVE DATE**

This revenue procedure is effective on December 10, 2018. Taxpayers may apply the safe harbor set forth in this revenue procedure to taxable years beginning after December 31, 2017.

#### **SECTION 6. DRAFTING INFORMATION**

The principal authors of this revenue procedure are Charles Gorham, Joanna Trebat, and Zachary King of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Mr. Gorham at (202) 317-5091, Ms. Trebat at (202) 317-7003, or Mr. King at (202) 317-7003 (not toll-free numbers).

## Part IV. Items of General Interest

### Announcement of Disciplinary Sanctions From the Office of Professional Responsibility

#### Announcement 2018–15

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, appraisers, and unenrolled/unlicensed return preparers (individuals who are not enrolled to practice and are not licensed as attorneys or certified public accountants). Licensed or enrolled practitioners are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Subtitle A, Part 10, and which are released as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations. Unenrolled/unlicensed return preparers are subject to Revenue Procedure 81–38 and superseding guidance in Revenue Procedure 2014–42, which govern a preparer’s eligibility to represent taxpayers before the IRS in examinations of tax returns the preparer both prepared for the taxpayer and signed as the preparer. Additionally, unenrolled/unlicensed return preparers who voluntarily participate in the Annual Filing Season Program under Revenue Procedure 2014–42 agree to be subject to the duties and restrictions in Circular 230, including the restrictions on incompetent or disreputable conduct.

The disciplinary sanctions to be imposed for violation of the applicable standards are:

**Disbarred from practice before the IRS**—An individual who is disbarred is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) for a minimum period of five (5) years.

**Suspended from practice before the IRS**—An individual who is suspended is not eligible to practice before the IRS as

defined at 31 C.F.R. § 10.2(a)(4) during the term of the suspension.

**Censured in practice before the IRS**—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual’s eligibility to practice before the IRS, but OPR may subject the individual’s future practice rights to conditions designed to promote high standards of conduct.

**Monetary penalty**—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction, or on an employer, firm, or entity if the individual was acting on its behalf and it knew, or reasonably should have known, of the individual’s conduct.

**Disqualification of appraiser**—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

**Ineligible for limited practice**—An unenrolled/unlicensed return preparer who fails to comply with the requirements in Revenue Procedure 81–38 or to comply with Circular 230 as required by Revenue Procedure 2014–42 may be determined ineligible to engage in limited practice as a representative of any taxpayer. Under the regulations, individuals subject to Circular 230 may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (*i.e.*, representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

**Disbarred by decision, Suspended by decision, Censured by decision, Monetary penalty imposed by decision, and Disqualified after hearing**—An administrative law judge (ALJ) issued a decision imposing one of these sanctions after the ALJ either (1) granted the government’s summary judgment motion or (2) conducted an evidentiary hearing upon OPR’s complaint alleging violation of the regulations. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ’s decision becomes the final agency decision.

**Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision**—An ALJ, after finding that no answer to OPR’s complaint was filed, granted OPR’s motion for a default judgment and issued a decision imposing one of these sanctions.

**Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal**—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

**Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent**—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual’s opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current fitness and eligibility to practice (*i.e.*, an active professional license or active enrollment status, with no intervening violations of the regulations).

**Suspended indefinitely by decision in expedited proceeding, Suspended indefinitely by default decision in expedited proceeding, Suspended by consent in expedited proceeding**—OPR instituted an expedited proceeding for suspension (based on certain limited grounds, including loss of a professional license for cause, and criminal convictions).

**Determined ineligible for limited practice**—There has been a final determination that an unenrolled/unlicensed return preparer is not eligible for limited representation of any taxpayer because the preparer violated standards of conduct or



failed to comply with any of the requirements to act as a representative.

A practitioner who has been disbarred or suspended under 31 C.F.R. § 10.60, or suspended under § 10.82, or a disqualified appraiser may petition for reinstatement before the IRS after the expiration of 5 years following such disbarment, suspension, or disqualification (or immediately following the expiration of the suspension or disqualification period if shorter than 5 years). Reinstatement will not be granted unless the IRS is satisfied that the petitioner is not likely to engage thereafter in conduct contrary to Circular 230, and that granting such reinstatement would not be contrary to the public interest.

Reinstatement decisions are published at the individual's request, and described in these terms:

**Reinstated to practice before the IRS**—The individual's petition for reinstatement has been granted. The individual is an attorney, certified public accountant, enrolled agent, enrolled actuary, or an enrolled retirement plan agent, and eligible to practice before the IRS, or in the case of an appraiser, the individual is no longer disqualified.

**Reinstated to engage in limited practice before the IRS**—The individual's petition for reinstatement has been granted. The individual is an unenrolled/unlicensed return preparer and eligible to engage in limited practice before the IRS.

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a final decision; (2) the individual has settled a dis-

ciplinary case by signing OPR's "consent to sanction" agreement admitting to one or more violations of the regulations and consenting to the disclosure of the admitted violations (for example, failure to file Federal income tax returns, lack of due diligence, conflict of interest, etc.); (3) OPR has issued a decision in an expedited proceeding for indefinite suspension; or (4) OPR has made a final determination (including any decision on appeal) that an unenrolled/unlicensed return preparer is ineligible to represent any taxpayer before the IRS.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by state and second by the last names of the sanctioned individuals.

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
<b>Arizona</b>				
	Moffatt, Jeffrey See California			
<b>California</b>				
Campbell	Charvez, Victoria	Enrolled Agent	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 3, 2018
Palmdale	Moffatt, Jeffrey	Attorney	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from August 2, 2018
<b>Florida</b>				
Lake Mary	Roy, William G. III	Attorney	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 25, 2018
<b>Maryland</b>				
Bel Air	McLaughlin, Louisa C.	Attorney	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 25, 2018
<b>Massachusetts</b>				
Great Barrington	McCormick, Edward G.	Attorney	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 25, 2018
<b>Minnesota</b>				
Stillwater	Harycki, Kenneth F.	CPA	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from September 19, 2018

<b>City &amp; State</b>	<b>Name</b>	<b>Professional Designation</b>	<b>Disciplinary Sanction</b>	<b>Effective Date(s)</b>
<b>New Jersey</b> Somerdale	Maruvada, Rajeswara R.	CPA	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from August 7, 2018
<b>Texas</b> The Woodlands	Mulder, James C.	Attorney	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 25, 2018
<b>Virginia</b> Chesapeake	Myers, Lenard T.	CPA	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 17, 2018
<b>West Virginia</b> Morgantown	Cason, Gregory N.	CPA	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from August 28, 2018

# Definition of Terms

*Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:*

*Amplified* describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

*Clarified* is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

*Distinguished* describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

*Obsoleted* describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

*Revoked* describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the sub-

stance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

*Supplemented* is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

*Suspended* is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

## Abbreviations

*The following abbreviations in current use and formerly used will appear in material published in the Bulletin.*

A—Individual.  
Acq.—Acquiescence.  
B—Individual.  
BE—Beneficiary.  
BK—Bank.  
B.T.A.—Board of Tax Appeals.  
C—Individual.  
C.B.—Cumulative Bulletin.  
CFR—Code of Federal Regulations.  
CI—City.  
COOP—Cooperative.  
Ct.D.—Court Decision.  
CY—County.  
D—Decedent.  
DC—Dummy Corporation.  
DE—Donee.  
Del. Order—Delegation Order.  
DISC—Domestic International Sales Corporation.  
DR—Donor.  
E—Estate.  
EE—Employee.  
E.O.—Executive Order.  
ER—Employer.

ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
F.R.—Federal Register.  
FUTA—Federal Unemployment Tax Act.  
FX—Foreign corporation.  
G.C.M.—Chief Counsel’s Memorandum.  
GE—Grantee.  
GP—General Partner.  
GR—Grantor.  
IC—Insurance Company.  
I.R.B.—Internal Revenue Bulletin.  
LE—Lessee.  
LP—Limited Partner.  
LR—Lessor.  
M—Minor.  
Nonacq.—Nonacquiescence.  
O—Organization.  
P—Parent Corporation.  
PHC—Personal Holding Company.  
PO—Possession of the U.S.  
PR—Partner.  
PRS—Partnership.

PTE—Prohibited Transaction Exemption.  
Pub. L.—Public Law.  
REIT—Real Estate Investment Trust.  
Rev. Proc.—Revenue Procedure.  
Rev. Rul.—Revenue Ruling.  
S—Subsidiary.  
S.P.R.—Statement of Procedural Rules.  
Stat.—Statutes at Large.  
T—Target Corporation.  
T.C.—Tax Court.  
T.D.—Treasury Decision.  
TFE—Transferee.  
TFR—Transferor.  
T.I.R.—Technical Information Release.  
TP—Taxpayer.  
TR—Trust.  
TT—Trustee.  
U.S.C.—United States Code.  
X—Corporation.  
Y—Corporation.  
Z—Corporation.



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<sup>1</sup>A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2018–01 through 2018–26 is in Internal Revenue Bulletin 2018–26, dated June 27, 2018.

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<sup>1</sup>A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2018–01 through 2018–26 is in Internal Revenue Bulletin 2018–26, dated June 27, 2018.

# **Internal Revenue Service**

## **Washington, DC 20224**

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## **INTERNAL REVENUE BULLETIN**

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at *www.irs.gov/irb/*.

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