

September 21, 2017

MEMORANDUM FOR: Brenda Aguilar
Office of Management and Budget OIRA

THROUGH: Michel Smyth
Departmental Clearance Officer

FROM: Timothy D. Hauser *TH*
Deputy Assistant Secretary for Program Operations
Employee Benefits Security Administration

SUBJECT: Request for Emergency PRA Clearance

Emergency Justification

The Department of Labor (DOL) is requesting that an information collection request associated with the coverage of certain preventive services under the Affordable Care Act be processed in accordance with the implementing regulations of the Paperwork Reduction Act of 1995 at 5 CFR 1320.13(a)(2)(i). We believe public harm is reasonably likely to occur if the normal, non-emergency clearance procedures are followed.

Specifically, we are requesting emergency review and approval in order to implement 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)). Normal clearance procedures will likely prevent or disrupt the collection of information associated with §147.131(c)(3), §147.131(e), and §147.131(c)(4). In accordance with 5 CFR 1320.13(a)(2)(i), we believe that public harm is reasonably likely to ensue if the normal clearance procedures is followed. The use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information. Similarly, in accordance with 5 CFR 1320.13(a)(2)(iii), we believe the use of normal clearance procedures is reasonably likely to cause a statutory or court ordered deadline to be missed. Many cases related to the provision of contraceptive services have been on remand for over a year from the Supreme Court asking the Departments of Health and Human Services, Labor, and Treasury (the Departments) and the parties to resolve this matter. The Departments are in the process of issuing interim final rules that expand exemptions to entities, which involves no collection of information and which the Departments have statutory authority to do by the use of interim final rules. If the information collection involved in the amended accommodation process is not approved on an emergency basis, newly exempt entities that wish to opt into the amended accommodation process might not be able to do so until normal clearance procedures are completed.

Background

The Patient Protection and Affordable Care Act, Public Law 111-148, (the Affordable Care Act) was signed into law by President Obama on March 23, 2010 and amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, on March 30, 2010. The Affordable Care Act added section 2713 to the Public Health Service Act and incorporated this provision into the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code). The Departments published interim final rules (2010 interim final rules) on July 19, 2010 (75 FR 41726) to require non-grandfathered group health plans and non-grandfathered group and individual health insurance coverage to provide benefits for certain preventive services without cost sharing, including benefits for certain women's preventive health services as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA), which guidelines HRSA adopted and released on August 1, 2011 (the HRSA Guidelines). Under section 2713 of the PHS Act, its implementing regulations, and the HRSA Guidelines, recommended preventive services required to be covered without cost sharing by applicable plans and coverage include certain contraceptive services.

On August 3, 2011, the Departments amended the 2010 interim final rules (76 FR 46621) (2011 interim final rule amendments) to provide HRSA with the authority to exempt group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) from the requirement to cover contraceptive services consistent with the HRSA Guidelines. The 2011 interim final rule amendments specified a definition of religious employer, which was adopted in the final regulations published on February 15, 2012 (77 FR 8725). Since then, the Departments have published several regulations to simplify and clarify the definition of religious employer and also provide accommodations for health coverage established or maintained or arranged by certain nonprofit religious organizations and closely-held for-profit organizations with religious objections to contraceptive services.

The 2017 interim final regulations titled "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" and "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" expand exemptions for religious beliefs and moral convictions for certain entities or individuals whose health plans may otherwise be subject to a mandate of contraceptive coverage through guidance issued pursuant to the Patient Protection and Affordable Care Act. The interim final rules extend the exemption to health insurance issuers that hold religious or moral objections in certain circumstances. The interim final rules also allow plan participants and enrollees with sincerely held religious or moral objections to request coverage that does not include contraceptive services.

The 2017 rules also leave the accommodation process in place as an optional process for certain exempt entities who wish to use it voluntarily. To avoid contracting, arranging, paying, or referring for contraceptive coverage, an organization seeking to be treated as an eligible organization may self-certify (by using EBSA Form 700), prior to the beginning of the first plan

year to which an accommodation is to apply, that it meets the definition of an eligible organization. The eligible organization must provide a copy of its self-certification to each health insurance issuer that would otherwise provide such coverage in connection with the health plan (for insured group health plans or student health insurance coverage). The issuer that receives the self-certification must provide for separate payments for contraceptive services for plan participants and beneficiaries (or students and dependents). For a self-insured group health plan, the self-certification must be provided to its third party administrator. An eligible organization may alternatively submit a notification to HHS as an alternative to submitting the EBSA Form 700 to the eligible organization's health insurance issuer or third party administrator. A health insurance issuer or third party administrator providing or arranging payments for contraceptive services for participants and beneficiaries in plans (or student enrollees and covered dependents in student health insurance coverage) of eligible organizations must provide a written notice to such plan participants and beneficiaries (or such student enrollees and covered dependents) informing them of the availability of such payments.

Eligible organizations can revoke at any time the accommodation process if participants and beneficiaries receive written notice of such revocation from the issuer or third party administrator in accordance with guidance issued by the Secretary, and if the accommodation process is currently being utilized, such revocation will be effective on the first day of the first plan year that begins on or after thirty days after the date of revocation.

Thank you for your consideration of this request. If any additional information is needed, please contact Chris Cosby at 202.698.8425 (cosby.chris@dol.gov).