August 2, 2018

VIA ELECTRONIC MAIL – Notice.comments@irscounsel.treas.gov

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2018-12)
Room 5203
P.O. Box 7604
Ben Franklin Station, 54
Washington, DC 20044

Re: Notice 2018-12, Notice of Transition Relief Regarding the Application of § 223 to Certain Health Plans Providing Benefits for Male Sterilization or Male Contraceptives

Dear Sir/Madam:

We, the undersigned organizations, are submitting this letter in response to Notice 2018-12, in which the Internal Revenue Service (the "IRS") requested comments on "the appropriate standards for preventive care under § 223(c)(2)(C)" of the Internal Revenue Code of 1986 (the "Code") "and other issues related to the provision of preventive care" under a high deductible health plan.[1] We appreciate the opportunity to provide input on this matter.

We strongly recommend that the IRS and the Treasury Department ("Treasury") issue guidance clarifying the definition of "preventive care" under § 223(c)(2)(C) to include all contraceptive drugs, devices, and sterilization procedures approved by the U.S. Food & Drug Administration ("FDA"), as well as patient education and counseling, because all of these methods are designed and used to prevent unintended pregnancies.

The Department of Health and Human Services ("HHS") commissioned the National Academy of Medicine Institute of Medicine ("IOM") to help it determine gaps in coverage and compile a list of "women's preventive services" that should be covered for purposes of § 2713 of the Public Health Service Act (the "PHSA").[2] According to the IOM's 2011 report (the "IOM Report"), unintended pregnancy is "a health condition of women for which little progress in prevention has been made, despite the availability of safe and effective preventive methods."[3] According to HHS's Healthy People 2020 initiative:

[1] 2018-12 I.R.B. 441.
[2] As added by § 1001(5) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010) and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (March 30, 2010) (collectively the "Affordable Care Act (ACA)").
[3] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 104 (July 19, 2011) [hereinafter IOM Report].

> For women, negative outcomes associated with unintended pregnancy can include [d]elays in initiating prenatal care, [r]educed likelihood of breastfeeding, [i]ncreased risk of maternal depression, and [i]ncreased risk of physical violence during pregnancy. Furthermore, births resulting from unintended pregnancies can have negative consequences including birth defects and low birth weight. Children from unintended pregnancies also are more likely to experience poor mental and physical health during childhood, and have lower educational attainment and more behavioral issues in their teen years. The negative consequences associated with unintended pregnancies are [even] greater for teen parents and their children.[4]

Given the serious yet preventable nature of unintended pregnancy, we strongly recommend that guidance on the definition of "preventive care" for the purposes of § 223(c)(2)(C) include male sterilization and male contraceptives. Male sterilization and male contraceptives prevent unintended pregnancies and their possible negative consequences for women and children, just like female sterilization and female contraceptives, which the IRS is obligated to recognize as preventive care under federal statute.[5] As the IOM Report noted in the same passage quoted above, "[f]amily planning services *are preventive services* that enable women *and couples* to avoid an unwanted pregnancy and to space their pregnancies to promote optimal birth outcomes" (emphasis added).[6] Male sterilization and male contraceptives also can be equally or more medically appropriate for a couple than female sterilization or female contraceptives, if medical conditions prevent or complicate the woman's use of one or more of those methods.[7] In fact, the FDA includes both male sterilization and male

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[4] Office of Disease Prevention & Health Promotion, *Healthy People 2020 Topics & Objectives: Family Planning* (last visited June 15, 2018), https://www.healthypeople.gov/2020/topics-objectives/topic/family-planning. *See also* Adam Sonfield, *Rounding Out the Contraceptive Coverage Guarantee: Why 'Male' Contraceptive Methods Matter for Everyone*, Vol. 18, Issue 2, Guttmacher Policy Review (June 10, 2015).

[5] 2013-40 I.R.B. 293.

[6] IOM Report at 104.

[7] *See* Ctrs. for Disease Control & Prevention, *Summary Chart of U.S. Medical Eligibility Criteria for Contraceptive Use* (June 2012), https://www.cdc.gov/reproductivehealth/unintendedpregnancy/pdf/legal_summary-chart_english_final_tag508.pdf.

condoms in its guide for women who do not want to get pregnant, noting that "[n]o one product is best for everyone."[8]

We believe the fact that services provided to one member of a couple prevent adverse health consequences for another should not impact their status under § 223(c)(2)(C) because the services remain "preventive." Indeed, the guidelines for preventive health services for women (the "Guidelines") that HHS's Health Resources and Services Administration ("HRSA") released pursuant to the directive in § 2713 of the PHSA contain at least one other example of such services that benefit a person other than the individual receiving the service: breastfeeding support, supplies, and counseling, which primarily benefit the child.[9]

In our view, nothing in § 223 would prevent the clarifying IRS guidance we recommend above from being issued. Section 223 was added by § 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.[10] Section 223(c)(2)(C) says "[a] plan shall not fail to be treated as a high deductible health plan by reason of failing to have a deductible for preventive care (within the meaning of § 1871 of the Social Security Act, except as otherwise provided by the Secretary)."[11] Health Savings Accounts guidance issued shortly thereafter adds that preventive care "does not include any service or benefit intended to treat an existing illness, injury or condition." This exclusion clearly does not apply to male sterilization and male contraceptives.[12] Notice 2018-12 does not even assert that including male sterilization and male contraceptives would be inconsistent with § 223(c)(2)(C); it merely says that "under current guidance" they are not included.

Revised guidance that includes male sterilization and male contraceptives in the definition of preventive care would be consistent with the purposes of § 223. According to the legislative history, "[i]t is intended that the Secretary of the Treasury will amend

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[8] U.S. Food & Drug Admin., *Birth Control Guide*, https://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM517406.pdf.

[9] *See* Health Res. & Servs. Admin., *Women's Preventive Services Guidelines* (Oct. 2017), https://www.hrsa.gov/womens-guidelines-2016/index.html.

[10] Pub. L. 108-173.

[11] Note that § 401(a)(57) of Division U (called the "Tax Technical Corrections Act of 2018") of H.R. 1625, the Consolidated Appropriations Act, 2018, which President Trump signed on March 23, 2018, appears to change the reference in § 223 from "§ 1871" of the Social Security Act to "§ 1861." Consistent with the terms used in Notice 2018-12, this comment retains reference to § 1871.

[12] 2004-33 I.R.B. 201.

the definition of preventative care if the definition used under the Social Security Act is inconsistent with the purposes of the provision."[13] A White House press release issued at the time stated that "[t]his will help more American families get the health care they need at a price they can afford."[14] One of the characteristics of preventive care is that it tends to reduce rather than increase the overall cost of care, by preventing expensive medical conditions from developing or reoccurring later, thus making it easier to afford.[15] The same would be true of male sterilization and contraceptives, which as noted above help prevent unintended pregnancies and their possible negative (and expensive) consequences for women and children. According to the National Business Group on Health, a non-profit organization representing employers' perspectives on health coverage issues, all FDA-approved contraceptive methods and voluntary sterilization, including vasectomy, are recommended as a minimum employer plan benefit with no employee cost-sharing, because the cost of adding complete coverage is more than made up for in expected cost-savings.[16]

We do not believe that anything in § 223 or the SSA requires different treatment of male and female sterilization or contraceptives. Section 223 has no direct relevance to § 2713 of the PHSA, which specifically limits its extension of the definition of "preventive health services" to include services supported by HRSA "with respect to women."[17] The reason for that limitation is that the amendment which became § 2713(a)(4) was intended to correct a problem of access to preventive care that was perceived to primarily affect women.[18] That does not mean that male sterilization and contraceptives are not "preventive care." At most, it means that Congress chose not to address problems relating to the availability of male sterilization and male contraceptives in the

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[13] *See* H.R. Conf. Rep. No. 108-391, at 846 & 848 (Nov. 21, 2003).

[14] Office of the Press Secretary, *Fact Sheet: Guidance Released on Health Savings Accounts (HSAs)* (Dec. 22, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031222-1.html.

[15] C*f.* Notice 2004-50, 2004-33 I.R.B. 196, Q&A-27 (explaining when drugs or medications are preventive care). *See* T.D. 9624, 78 Fed. Reg. 39869, 39877 (July 2, 2013) ("Several studies have estimated that the costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health. The Departments are unaware of any studies to the contrary.").

[16] National Business Group on Health, *Maternal & Child Health Plan Benefit Model: Evidence-Informed Coverage and Assessment* (2012), https://www.businessgrouphealth.org/pub/?id=F314192A-2354-D714-5132-C2DAFAAF0DFD.

[17] *See also* 78 Fed. Reg. 39870 ("On August 1, 2011, HRSA adopted and released guidelines for women's preventive health services (HRSA Guidelines) based on recommendations of the independent Institute of Medicine . . . The HRSA Guidelines exclude services relating to a man's reproductive capacity, such as vasectomies and condoms.").

[18] *See* 155 Cong. Reg. S11987-88 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski); *see also* IOM Report at 18–20 (entitled "Why Women?").

Affordable Care Act ("ACA"). Section 2713(a)(4) of the PHSA is therefore distinct from the definition of preventive care that the IRS can promulgate under § 223(c)(2)(C). This does not mean that the IRS has free rein to ignore the federal classification of services as preventive under § 2713. The issue here, however, is whether the IRS can go beyond the services specifically classified as preventive under federal law and recognize additional services if the public health evidence so supports; we believe it can.

In conclusion, the undersigned organizations urge the IRS to reconsider its position in Notice 2018-12 and strongly support inclusion of male sterilization and male contraceptives as "preventive care" for purposes of § 223, recognizing the important role that men play in preventing unintended pregnancy. Including male sterilization and male contraceptives as "preventive care" would provide unfettered access to all of the most suitable methods of sterilization or contraception for an individual's needs and circumstances.

Thank you for your attention to our comments. If you have any questions or need any further information, please contact Susan Berke Fogel, Reproductive Health Director for the National Health Law Program, at fogel@healthlaw.org or 310-736-1658.

Respectfully Submitted,

National Health Law Program (NHeLP)
American Atheists
American Civil Liberties Union
American College of Obstetricians and Gynecologists
American Society for Reproductive Medicine
Asian & Pacific Islander American Health Forum
Association of Reproductive Health Professionals
Center for Reproductive Rights
Colorado Organization for Latina Opportunity and Reproductive Rights
Consumer Health First
Gender Justice League
Ibis Reproductive Health
Jacobs Institute of Women's Health
Medical Students for Choice
NARAL Pro-Choice America
NARAL Pro-Choice Wyoming
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Lesbian Rights

National Council of Jewish Women
National Family Planning & Reproductive Health Association
National Institute for Reproductive Health (NIRH)
National Latina Institute for Reproductive Health
National LGBTQ Task Force
National Women's Health Network
Northwest Health Law Advocates (NoHLA)
Public Justice Center
Sexuality Information and Education Council of the United States (SIECUS)
Society for Male Reproduction and Urology
South Carolina Appleseed
Surge Reproductive Justice
Union for Reform Judaism
URGE: Unite for Reproductive & Gender Equity
Washington State Coalition Against Domestic Violence (WSCADV)
Whitman-Walker Health
WV FREE
Young Women United