

**Testimony of Judy Waxman, Vice President for Health and Reproductive Rights
National Women's Law Center**

**House Committee on Energy and Commerce, Subcommittee on Health
Hearing on the Affordable Care Act's Contraceptive Coverage Guarantee
November 2, 2011**

Mr. Chairman and Members of the Committee:

I am Judy Waxman, Vice President of Health and Reproductive Rights at the National Women's Law Center. Since 1972, the National Women's Law Center has worked to protect and advance the progress of women and their families in core aspects of their lives, with an emphasis on the needs of low-income women. The Center utilizes a wide range of tools—including public policy research, monitoring, and analysis; litigation, advocacy, and coalition-building; and public education—to achieve gains for women and their families, including to protect and advance women's reproductive health and rights. Thank you for the opportunity to submit testimony today.

One of the Affordable Care Act's key protections is the guarantee that all new insurance plans will cover preventive services, including counseling, screenings, and interventions that have received either "A" or "B" recommendations from the United States Preventive Services Task Force.¹ The Women's Health Amendment, enacted because Congress recognized that these recommendations left some important gaps in preventive care for women,² required the Department of Health and Human Services (HHS) to identify additional preventive health services for women that should be covered and provided to patients at no cost. The Institute of Medicine (IOM) reviewed the available evidence and recommended additional women's preventive health services that should be included in the required coverage of preventive health services without cost-sharing.

The IOM released its findings on July 19, 2011, recommending coverage and no cost-sharing for a range of important women's preventive health services including screening for cervical cancer; critical health services for pregnant women, including breastfeeding support; screening for intimate partner violence; and all FDA-approved forms of contraception.³ HHS adopted the IOM's recommendations on August 1, 2011. Unfortunately, HHS has included in its Interim Final Rules (IFR) a provision that would allow certain religious employers to exclude contraceptive services from their employees' health plans. Rather than giving all women true contraceptive access, the exemption arbitrarily precludes certain women from receiving needed preventive care. Women who work for employers who invoke an exemption will not receive the intended benefits, and will be required to pay for what the IOM and HHS itself have determined should be available at no cost.

No cost-sharing contraceptive coverage provides tremendous benefits for women. Contraception is critical preventive health care for women. Contraceptive use is nearly universal among women of reproductive age in the United States.⁴ Planned pregnancies—which for most women require contraception—improve women’s health and their ability to have healthy pregnancies. The ability to determine the timing of a pregnancy can prevent a range of pregnancy complications that can endanger a woman’s health, including gestational diabetes, high blood pressure, and placental problems, among others.⁵ Contraception is critical to helping women achieve healthy pregnancies. Women who wait for some time after delivery before conceiving their next child lower their risk of adverse perinatal outcomes, including low birth weight, preterm birth, and small-for-size gestational age.⁶ Guaranteeing access to contraception therefore benefits the health of women and their families.

Cost plays a major role in women’s ability to use contraceptives. Contraception costs burden women’s access to birth control. Evidence suggests that even moderate co-payments can cause individuals to forgo needed preventive care, particularly those with low and moderate incomes. For example, a survey by Planned Parenthood found that one in three women reported struggling with the cost of prescription birth control at some point.⁷ Another survey, conducted by the Guttmacher Institute in 2009, found that because of the economic recession, 23% of women reported having difficulty paying for birth control and 24% put off a gynecology or birth control visit because of cost.⁸ Costs can also lead women to use contraception inconsistently or incorrectly; for example, 18% of women report inconsistent use as a means of saving money. Removing these barriers to access is critical for improving women’s health.

HHS’s decision to guarantee no cost-sharing coverage of contraception is a milestone for women. Removing these cost-related barriers is a tremendous benefit for women and their families and underscores the real and tangible impact the new health care law will have on women’s lives.

Nothing in the Women’s Health Amendment requires any person to use contraception. The requirement is merely that contraceptive services be covered in insurance plans at no cost-sharing, such that individuals may choose whether or not to access those services. Senator Barbara Mikulski, the author of the Women’s Health Amendment, put it well when explaining the purpose of the provision on the Senate floor: “[W]e do not mandate that you have the service; we mandate that you have access to the service. The decision as to whether you should get it will be a private one, unique to you.”

Requiring employers—including religious employers—to cover contraceptives does not break any new legal ground. In fact, states have long guaranteed contraceptive coverage. Twenty eight states have laws and policies that guarantee health insurance coverage of prescription contraceptives in insurance policies that cover other prescription drugs and devices.⁹ The first of these laws was enacted in 1998; the most recent in 2010. Eight states have no religious exemption.

In addition to these state laws and policies, Title VII of the Civil Rights Act of 1964 requires employers with fifteen or more employees to provide coverage of contraception if the employee health insurance plan covers other preventive drugs and services. In December 2000, the EEOC

issued a Commission Ruling stating that it is sex discrimination for employer-sponsored health insurance plans to provide coverage of other prescription drugs and preventive services but fail to provide coverage of contraceptives. This guidance has remained in place throughout the Bush Administration to this day. Title VII contains no provision allowing employers, religious or otherwise, to discriminate against their employees in pay or benefits. Moreover, many religiously-affiliated employers already provide contraceptive coverage. The National Women's Law Center has identified a number of religiously-affiliated employers that cover contraception in the health insurance policies they offer to their employees.

An exemption that allows religious employers to refuse to comply with the contraceptive coverage guarantee has no basis under the law. The Affordable Care Act does not allow for any exemptions that discriminate against women. Section 1557(a) of the Affordable Care Act prohibits sex discrimination in any health program or activity, any part of which is receiving Federal financial assistance. As described above, it has been determined that it is sex discrimination to exclude coverage of contraception for women when the employee health insurance plan covers other preventive drugs and services.¹⁰ It is unacceptable—as a matter of law and policy—for an agency to create an exception to longstanding civil rights principles that allow religious employers not to comply with the law.

Contrary to the assertion of some who oppose the contraceptive coverage provision, the Constitution does not require a religious exemption. The Supreme Court has held that neutral, generally applicable laws do not violate the Free Exercise Clause of the First Amendment, even if they were to burden the exercise of religion.¹¹ The coverage of contraception is a neutral regulation that applies to all employers; it does not single out any religious entity or practice. Accordingly, guaranteeing contraception coverage does not violate the First Amendment.

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), amended by Health Care and Education Affordability and Reconciliation Act, Pub. L. No. 111-152 (2010) (to be codified at 42 U.S.C. § 18023).

² Public Health Service Act, Pub. L. No. 78-410 (1944), amended by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001 (2010) (to be codified at 42 U.S.C. § 18023).

³ Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps (July 19, 2011), available at <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx>.

⁴ Rachel Jones & Joerg Dreweke, Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use 4 (Apr. 2011), available at <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf>.

⁵ March of Dimes, Pregnancy After 35 (May 2009), http://www.marchofdimes.com/Pregnancy/trying_after35.html.

⁶ U.S. Dep't of Health and Human Servs., Healthy People 2010 9-32 (2nd ed. 2000), available at <http://www.healthypeople.gov/Document/pdf/Volume1/09Family.pdf>.

⁷ Planned Parenthood, Survey: Nearly Three in Four Voters in America Support Fully Covering Prescription Birth Control, (Oct. 2010), available at <http://www.plannedparenthood.org/about-us/newsroom/press-releases/survey-nearly-three-four-voters-america-support-fully-covering-prescription-birth-control-33863.htm>.

⁸ Guttmacher Institute, A Real Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions, (Sept. 2009), available at <http://www.guttmacher.org/pubs/RecessionFP.pdf>.

⁹ In addition to the states that have enacted laws, Michigan and Montana also require contraceptive coverage. Michigan's requirement is based on an Administrative ruling, while Montana's requirement is based on an Attorney General opinion.

¹⁰ See EEOC Guidance, adopted December 14, 2000.

¹¹ See, e.g., *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (abrogated by statute).