

**COMMENTS OF THE SEX AND LAW COMMITTEE REGARDING
NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
PROPOSED RULE MAKING:
ADDITION OF SECTIONS 52.1(P), 52.2(Y), (Z), (AA) AND
52.16(O) TO TITLE 11 NYCRR**

The Sex and Law Committee of the New York City Bar Association is grateful for the opportunity to provide comments to the Department of Financial Services regarding the addition of Sections 52.1(p), 52.2(y), (z), (aa) and 52.16(o) to Title 11 New York Codes, Rules & Regulations (NYCRR), clarifying existing requirements for coverage for medically necessary abortions and requiring insurance policies that provide hospital, surgical, or medical expense coverage to include coverage for medically necessary abortions without copayments, coinsurance or first meeting annual deductibles.¹

The Sex and Law Committee of the New York City Bar Association addresses issues pertaining to gender and the law in a variety of areas that aim to reduce barriers to gender equality in health care, the workplace, and civic life, and to promote respect for the rule of law. The Committee's members work and practice in a wide range of areas, including, violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage. In light of the Committee's long history and expertise in promoting gender equality and defending constitutional rights, we are uniquely positioned to submit comments on the proposed sections.

The Sex and Law Committee commends the Department for clarifying that medically necessary abortions must be included as part of basic health insurance coverage and requiring coverage for this care without co-payments, co-insurance or first meeting annual deductibles. We are, however, deeply troubled by the regulations' expansion of New York's existing definition of religious employers and strongly recommend that the Department narrow this definition to ensure that the regulations improve access to abortion coverage for women in New York and prevent discrimination against female employees in the provision of health benefits. At a time when the federal administration and Congress have both stated their intent to reduce access to health care and restrict abortion coverage, New York has a special obligation to lead on women's health and equality and serve as a model for the country.

¹ Katharine Bodde, Alyson Zureick, and Hillary Schneller of the Sex & Law Committee were the primary drafters of these comments, which draw from model comments issued by the New York Civil Liberties Union.

ABORTION SERVICES ARE ESSENTIAL FOR WOMEN'S HEALTH AND EQUALITY

Abortion is essential to women's health and equality. Abortion access ensures women² can make important decisions about their health and lives and is a central component of a woman's health care plan. Further, because abortion is crucial to a woman's ability to choose when and whether to have a child, it plays a central role in her ability to participate equally in the economic and social life of the nation.³ Ensuring insurance coverage for comprehensive reproductive health care including abortion thus promotes equality in several ways. By contrast, the inability of women to obtain insurance coverage for abortion, whether publicly funded or through private insurance, results in negative health outcomes for women, forces women below the poverty line, and impedes their constitutional right to abortion.

Across the country, and at the state and federal levels, opponents of abortion seek to reduce access to services by restricting public and private insurance coverage for abortion. Only 17 states provide public insurance coverage for medically necessary abortions (13 of those states do so under a court order).⁴ Twenty-five states restrict abortion coverage in insurance exchange plans and another 10 restrict insurance coverage of abortion in all private plans sold in the state.⁵ As of 2015, abortion coverage through the insurance marketplace was still not available to 60% of the over three million uninsured women who were of reproductive age.⁶

Lack of insurance coverage for abortion and high co-payments remain significant barriers to accessing abortion. For women who are low-income and lack insurance coverage that covers abortion, the cost of an abortion can delay or deter access to care.⁷ In 2013, 94,326 women obtained abortions in New York, with Medicaid covering almost 50%, while 20% were paid for out of pocket.⁸ The cost of an abortion without insurance coverage can be daunting. The average

² Not all people who seek abortion care identify as women. While the comments here reference "women" and "female" they are meant to capture all who seek this care, including, but not limited to, transgender men.

³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

⁴ Guttmacher Institute, *State Funding of Abortion Under Medicaid, State Laws and Policies* (Feb. 1, 2017), <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid>.

⁵ National Women's Law Center, *State Bans on Insurance Coverage of Abortion Endanger Women's Health and Take Health Benefits Away from Women*, Dec. 6, 2016. Available at: <http://nwlc.org/resources/state-bans-insurance-coverage-abortion-endanger-women%E2%80%99s-health-and-take-health-benefits-away-women/>.

⁶ Alina Salganicoff & Laurie Sobel, *Abortion Coverage in Marketplace Plans, 2015*. The Henry J. Kaiser Family Foundation (Jan. 21, 2015), <http://kff.org/womens-health-policy/issue-brief/abortion-coverage-in-marketplace-plans-2015/>.

⁷ Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*. 19 Guttmacher Policy Review 46 (2016), http://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf

⁸ New York State Department of Health. *Induced Abortion by Woman's Age - New York State 2013*, http://www.health.ny.gov/statistics/vital_statistics/2013/table20.htm.

out-of-pocket cost for women who obtained abortion without any assistance from insurance was \$575, versus \$18 and \$0 when private insurance or Medicaid paid, respectively.⁹

To afford an abortion, many lower income women who lack insurance coverage must find the money from other sources, using money that would otherwise be used for utility bills, rent, groceries and clothing for themselves and their children, or selling their belongings.¹⁰ Finding the money takes time, delaying access to the procedure. This further compounds the burdens faced by women without insurance coverage because although abortion is very safe, the risks associated with it increase as the pregnancy progresses, as does the cost. One study showed that 54% of women reported that they were unable to seek care earlier due to the time it took for them to raise the money for an abortion.¹¹ Moreover, the costs associated with delay can be high. For example, in 2011 and 2012, the median charge for an aspiration abortion at 10 weeks gestation was \$495, and \$500 for a medication abortion before the 10th week. The cost for an abortion at 20 weeks is almost triple at \$1,350.¹² Further, as fewer providers are available to provide abortion care later in pregnancy, women who are delayed in seeking care may need to travel further and incur additional costs, such as travel, lodging, and childcare. In 2011, 53% of New York counties had no abortion clinic; 12% of New York women lived in these counties.¹³ Indeed, additional travel costs, on top of the cost of the procedure, could make obtaining an abortion prohibitively expensive.¹⁴

ADDITIONS TO TITLE 11 NYCRR CLARIFY COVERAGE FOR MEDICALLY NECESSARY ABORTION AND REQUIRE COVERAGE WITHOUT A CO-PAYMENT

On February 8, 2017, the Department of Financial Services published a proposed rule adding sections 52.1(p), 52.2(y), (z), (aa) and 52.16(o) to Title 11 New York Codes, Rules & Regulations (NYCRR). This proposed rule clarifies that insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for medically necessary abortions.¹⁵ In addition, under the Department's authority reflected by N.Y. Ins. Law § 3217(a)(5), the proposed rule removes copayments, coinsurance or the need to meet annual deductibles for medically necessary abortions. The Sex and Law Committee strongly supports

⁹ Sarah Roberts, et al., *Out-of-pocket Costs and Insurance Coverage for Abortion in the United States*, 24 *Women's Health Issues* e211 (2014), <http://dx.doi.org/10.1016/j.whi.2014.01.003>.

¹⁰ Rachel K. Jones, Ushma Upadhyay & Tracy A. Weitz, *At what cost? Payment for Abortion Care by U.S. Women*, 23 *Women's Health Issues* e173-e178 (2013), <http://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/j.whi.2013.03.001.pdf>.

¹¹ See *supra* note 6.

¹² Jenna Jerman, & Rachel K. Jones, *Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012: Gestational Age Limits, Cost, and Harassment*. 24 *Women's Health Issues* e19 (2014), <http://www.guttmacher.org/pubs/journals/j.whi.2014.05.002.pdf>.

¹³ Guttmacher Institute, *State Reproductive Health Profile: New York*, <http://www.guttmacher.org/datacenter/profiles/NY.jsp>

¹⁴ *Supra* note 9 at e177.

¹⁵ The Department of Financial Services should take this opportunity to clarify its position that the determination of medical necessity is left to the attending health care provider and cannot be limited by the insurance policy.

these additions and applauds the Department for recognizing the centrality of abortion care to women's health and lives.

NEITHER STATE NOR FEDERAL LAW REQUIRES THE PROPOSED RULE'S BROAD EXEMPTION FOR "QUALIFYING RELIGIOUS ORGANIZATIONS," AND THE EXEMPTION UNDERCUTS CONSTITUTIONAL BOUNDARIES BETWEEN CHURCH AND STATE AND RESULTS IN GENDER DISCRIMINATION IN THE PROVISION OF HEALTH BENEFITS

The proposed rule exempts certain employers from including abortion in their health insurance coverage: 1) a narrow category of religious employers such as houses of worship (hereinafter "religious employers"), and 2) qualified religious organizations that include non-profit organizations and closely held for-profit entities whose management or owners have religious objections to abortion (hereinafter "qualifying religious organizations").¹⁶ Upon obtaining a certification that an employer qualifies for the exemption, the policy issued to that employer for its employees may exclude coverage of medically necessary abortions from the employer's health care plan, but the insurance company is required to issue a rider to each insured employee that provides separate coverage for medically necessary abortions at no-cost.

The Sex and Law Committee urges the Department to remove the exemption for "qualifying religious organizations." New York law related to other reproductive health care includes language providing a similar exemption for the first category of "religious employers,"¹⁷ but no New York law has ever exempted those defined here as "qualifying religious organizations" from providing basic insurance coverage for their employees. Doing so here would set an unnecessary and discriminatory precedent.

¹⁶ The proposed regulation defines religious employer and qualified religious employer as follows: "Religious employer shall have the meaning set forth in Insurance Law sections 3221(l)(16)(A)(1) and 4303(cc)(1)(A). (z) Qualified religious organization employer means an organization that: (1) opposes medically necessary abortions on account of a sincerely held religious belief; and (2)(i) is organized and operates as a nonprofit entity and holds itself out as a religious organization; or (ii) is organized and operates as a closely held for-profit entity, as defined in subdivision (aa) of this section, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs.(aa) Closely held for-profit entity means an entity that: (1) is not a nonprofit entity; (2) has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and (3) has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's certification described in section 2.16(o)(2) of this Part; provided, however, that: (i) ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries and ownership interests owned by a nonprofit entity are considered owned by a single owner; (ii) an individual is considered to own the ownership interests owned, directly or indirectly, by or for the individual's family, provided that, for the purposes of this subdivision, "family" includes only brothers, sisters, a spouse, ancestors, and lineal descendants; and (iii) if an individual holds an option to purchase ownership interests, then the individual is considered to be the owner of those ownership interests."

¹⁷ See *infra* notes 18-19 and accompanying text

The exemption for “qualifying religious organizations” allows employers to discriminate against female employees and follows a disturbing national trend that reduces access to women’s health care and degrades the constitutional boundaries between church and state. The exemption is also legally unnecessary, as New York State’s highest court, the New York Court of Appeals, has already made clear.

Requiring coverage of medically necessary abortion in insurance plans does not infringe on religious liberty. Indeed, the proposed rule—like the insurance coverage laws that have come before it and a host of generally applicable anti-discrimination and labor laws across the country—is unremarkable from a religious freedom perspective. Some religious doctrines oppose abortion; others do not and hold that sexual intimacy need not be linked to procreation and that planning childbearing is a morally responsible act. Both are entitled to respect. In our constitutional system, the government must be a neutral actor, allowing individuals to follow their own religious or moral consciences. Ensuring medically necessary abortion coverage in health insurance plans does just that—it allows every woman to decide for herself whether to choose abortion based on her health and circumstances, which can include her own religious and moral beliefs.

1. Neither Federal nor State Law Requires Exempting “Qualifying Religious Organizations” from Including Abortion Coverage in Their Comprehensive Insurance Plan.

The provision of insurance coverage by organizations that operate in the public sphere and employ individuals with diverse backgrounds is a secular activity. No special rules are warranted here for exempting “qualifying religious organizations” from providing insurance: neither New York law nor federal law requires a broad exemption for non-profit organizations or closely held for-profit entities.

In 2002, the New York Women’s Health and Wellness Act (WHWA) was enacted and requires insurance plans issued in New York that cover prescription drugs to include all Food and Drug Administration (FDA) approved contraceptive drugs and devices.¹⁸ The WHWA created a narrow exemption for religious employers such as churches and other houses of worship¹⁹—the same exemption for religious employers in the proposed rule at issue.

In *Catholic Charities of the Diocese of Albany, et al. v. Serio*, Catholic Charities, a non-profit organization affiliated with the Catholic Church, but not a religious employer under WHWA, challenged the contraceptive equity law on First Amendment religious freedom

¹⁸ N.Y. Ins. Law § 3221 (l)(16) (requiring all federal Food and Drug Administration approved contraceptive services including oral contraceptives, diaphragms, Norplant, Depo Provera, cervical caps, IUDS and generic equivalents).

¹⁹ *Id.* at § 3221 (l)(16)(A)(1) (defining a “religious employer” as “an entity for which each of the following is true: (a) The inculcation of religious values is the purpose of the entity; (b) the entity primarily employs persons who share the religious tenets of the entity; (c) the entity serves primarily persons who share the religious tenets of the entity; and (d) the entity is “a nonprofit organization as described in Section 6033(a)(2)(A) i or iii, of the Internal Revenue Code of 1986, as amended.”).

grounds, arguing that the law was unconstitutionally narrow.²⁰ In 2006, New York’s highest court, the New York Court of Appeals, rejected the challenge and found the law constitutional.²¹ In doing so, the Court of Appeals specifically rejected arguments that requiring contraceptive coverage violated constitutional protections for religious liberty. The Court explained that “when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees’ legitimate interests in doing what their own beliefs permit.”²² Under *Serio* then, New York law does not require the religious exemption for “qualifying religious organizations” in the proposed rule.

Further, federal law does not require states to broadly exempt non-profit organizations and closely held for-profit entities from otherwise generally applicable laws on religious grounds. In recent years, individuals and institutions have invoked the federal Religious Freedom Restoration Act (RFRA) to assert religious objections to laws of general applicability.²³ In one such case, *Burwell v. Hobby Lobby Stores, Inc.*, the United States Supreme Court held that “closely held” for-profit employers do not have to comply with the Patient Protection and Affordable Care Act’s (ACA) contraceptive coverage requirement where it violates the employers’ religious beliefs under the federal RFRA.²⁴ However, federal RFRA does not apply to actions by New York government agencies²⁵ and New York State does not have a state-level RFRA. Thus, the Department is not legally required under federal or state law to include a broad exemption for “qualifying religious organizations.”

2. Exempting Institutions that Operate in the Public Sphere from Including Abortion Coverage from their Comprehensive Benefit Package is Gender Discrimination, and a Rider Scheme is No Solution.

Any religious exemption should be narrowly constructed to avoid discriminating against those who should benefit from legal requirements, especially when there is no actual infringement on religious liberty and the policy in question is designed to address a significant public interest. In this case, a broad religious exemption would allow “qualifying religious organizations” to discriminate against female employees in the provision of health benefits.

²⁰ *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 520 (N.Y. 2006).

²¹ *Id.*

²² *Id.* at 528.

²³ 42 U.S.C. §§ 2000bb–1(a), (b) (the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

²⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2764 (2014) (while the Court does not define a closely held business, it looks to several characteristics of the plaintiffs’ business including whether a family retains exclusive control through sole ownership, control of its board of directors and its voting shares).

²⁵ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Omitting medically necessary abortion coverage from a comprehensive benefit package is gender discrimination. Abortion is a form of health care available only to women, thus, in an otherwise comprehensive insurance package that lacks that abortion coverage, men receive comprehensive health care coverage and women do not. Moreover, the consequences of being unable to access abortion fall primarily on women. The Equal Employment Opportunity Commission explained this over a decade ago in the context of contraceptive coverage, stating that employers must include contraceptive coverage when they offer coverage for comparable drugs and devices, because to do otherwise would discriminate based on gender.²⁶ As one court explained, “carv[ing] out benefits uniquely designed for women” discriminates against them.²⁷ The same analysis applies to abortion coverage. Exempting institutions that operate in the public sphere from laws and policies designed to promote the general welfare and gender equality necessarily privileges the beliefs of some at the expense of harm to others.

Although the Department proposes a rider scheme through which to ensure coverage, the scheme cannot alleviate the problem. Rider schemes segregate essential reproductive healthcare from comprehensive health coverage while raising serious concerns as to whether employees at the affected institutions would receive seamless coverage. As the state’s experience with mandatory third party provider arrangements set up to cover contraception has shown, these third party arrangements have thus far proven difficult to track and present administrative hurdles that often fall on the individual consumer. The proposed regulation provides no oversight mechanism to ensure that riders are indeed issued to each certificate holder employed by exempt organizations or that coverage is comprehensive and seamless under these policies. Absent accountability provisions, the rider risks leaving employees at exempt organizations without equivalent comprehensive and seamless abortion care as other women in New York.

Even if a rider system could provide seamless coverage, exempting companies and organizations whose owners or management hold certain religious beliefs is an unacceptable imposition of religious beliefs on others, as well as a blow to gender equality and public health. The “qualifying religious organizations” under the proposed rule open their doors and their services to the public. In doing so, they are—and should be—subject to generally applicable laws prohibiting discrimination. The Department’s proposed rule aims to redress gender discrimination in health benefits. We do not believe this goal can be accomplished if the Department includes the current exemption for “qualifying religious organizations.” Without equal and seamless access to abortion coverage for employees at exempt organizations, female employees face discrimination based on gender in the provision of their health benefits.

²⁶ Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> (“Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.”); *see also* *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). *But see* *In re Union Pac. R.R. Emp’t Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (concluding that the Pregnancy Discrimination Act did not encompass contraceptives).

²⁷ *Erickson*, 141 F. Supp. 2d at 1271.

3. Given Current National Trends, New York Should Be Standing Against Gender Discrimination in the Provision of Health Benefits.

In light of the current federal administration's intention to reduce access to women's health care and to expand religious exemptions, as well as the stated intent of the Congressional majority to prohibit abortion coverage in any health plan paid for in any part with federal premium tax credits,²⁸ now, more than ever, New York must stand up and be a leader for women's health and equality.

The current presidential administration and Congress pose a significant threat for access to women's health care. Indeed, President Trump has already taken actions to diminish access to abortion care across the globe;²⁹ and the administration's intention to dismantle abortion access and rights domestically has emboldened other states to pass anti-abortion legislation.³⁰ As a candidate, President Trump assured his supporters that he would also prioritize codifying the Hyde Amendment into federal law permanently, defunding Planned Parenthood, and banning abortions at 20 weeks.³¹ Further, the administration has signaled support for broad religious exemptions that would allow organizations to discriminate against employees based on their gender and sexual orientation.³² New York, like states all over the country, should be moving in the opposite direction. In the face of a federal administration that seeks to allow institutions to use religion to discriminate against women, New York must stand for principles of equality and access to health care and be a model for the rest of the country to follow.

Opposition to neutral laws in the name of religion is neither new nor unique to abortion care. Similar claims about infringements on religious liberty have arisen in other contexts to resist efforts to achieve equality. In the past, individuals and institutions have raised religious objections to general laws from racial integration to equal pay. In some cases, institutions tried to opt out of laws advancing equality; each time, their claims were rejected. Just as it does not violate religious freedom to require segregated institutions to integrate,³³ or to require schools to pay their employees equally despite their gender,³⁴ there is no violation of religious freedom

²⁸ Christina Cauterucci, *The GOP Health-Care Plan Would Effectively Dismantle Insurance Coverage for Abortion*, Slate (March 7, 2017), http://www.slate.com/blogs/xx_factor/2017/03/07/the_gop_health_care_plan_would_effectively_dismantle_insurance_coverage.html.

²⁹ Somini Sengupta, *Trump Revives Ban on Foreign Aid to Groups That Give Abortion Counseling*, The New York Times (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/world/trump-ban-foreign-aid-abortion.html>.

³⁰ Sabrina Tavernise, *Abortion Foes, Emboldened by Trump, Promise 'Onslaught' of Tough Restrictions*, The New York Times (Dec. 11, 2016), <https://www.nytimes.com/2016/12/11/us/abortion-foes-donald-trump-restrictions-politics.html>.

³¹ Letter from Donald J. Trump, Candidate for President, to Susan B. Anthony List (Sept. 16, 2016), <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf>.

³² Michelle Goldberg, *Donald Trump, the Religious Right's Trojan Horse*. The New York Times (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html>.

³³ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

³⁴ *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

when the law requires companies and organizations that provide insurance coverage to include coverage for medically necessary abortions.

New York has a history of both respecting religious liberty and advancing women's health and equality, including through the Women's Health and Wellness Act. This regulation should not depart from that laudable legacy.

For the foregoing reasons, the Sex and Law Committee, strongly recommends narrowing the proposed rule's religious exemption to remove "qualifying religious organizations" from the list of entities that may refuse to include medically necessary abortion care in their health plans. A simple, narrow exemption for institutions such as houses of worship supports the interests of religious liberty while protecting women's health and equality.

Abortion is a critical component of basic care for women. Women need meaningful access to abortion to plan their lives and protect their health. The Sex and Law Committee commends the Department for working to reduce barriers to abortion care. The proposed rule should remove "qualifying religious organizations" from the category of entities that are exempt from providing abortion coverage and remove the proposed rider scheme. Anything less sacrifices women's health, women's equality, and true religious liberty— i.e., where the law privileges no set of religious beliefs, does not impose it on others, nor uses it to discriminate against others.

Sex and Law Committee
Katharine Bodde, Chair

March 2017