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Comment on the Definition of "Eligible Organization" for Purposes of Coverage of Certain Preventive Services Under the Affordable Care Act

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Boalt Hall

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-P, P.O. Box 8010
Baltimore, MD 21244-1850.

Submitted Electronically

Re: Comment on the Definition of “eligible organization” for purposes of Coverage of Certain Preventive Services under the Affordable Care Act. [File Code CMS–9940–P]

Dated: October 8, 2014

Dear Sir or Madam:

We are all professors of law at the University of California, Berkeley, School of Law, as well as specialists in the study and teaching of corporate law.¹ This letter responds to the request published in the Federal Register on August 27, 2014 (the *Proposing Release*) seeking “comments on potential changes to the definition of ‘eligible organization’ in the Departments’ regulations in light of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).”²

Summary

When delineating the circumstances under which for-profit organizations may claim religious exemptions from the Patient Protection and Affordable Care Act contraception mandate under section 2713 of the Public Health Service Act (*PHSA*),³ the department of Health and Human Services and other agencies should be responsive to the dictates of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In *Hobby Lobby*, the Supreme Court held that the nexus of identity between several closely-held, for-profit corporations and their shareholders holding “a sincere religious belief that life begins at conception”⁴ was sufficiently close to justify granting such corporations an exemption from section 2713 of the PHSA pursuant to the Religious Freedom Restoration Act of 1993 (*RFRA*).⁵ More specifically, the Court ascertained that the overall interests of the corporations and their natural-person shareholders were sufficiently identical to warrant ascribing the religious commitments of the shareholders to their corporations. Notably, the Court stopped short of articulating a diagnostic test for determining when a

¹ We were assisted in the research for this letter by Lauren Assaf and thank her for her help.

² Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

³ This provision was added at 42 U.S.C. § 300gg-13 by the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), and incorporated into section 715(a)(1) of the Employee Retirement Income Security Act of 1974 and section 9815(a)(1) of the Internal Revenue Code.

⁴ *Hobby Lobby*, 134 S. Ct. at 2775.

⁵ Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended 42 U.S.C. §§ 2000cc-5(7)(a)).

sufficient overlap of interests exists; instead, it concluded that well-established principles in state corporate law should provide such guidance.

We believe that state corporate law does in fact provide the diagnostic test the Court desires for determining when it is appropriate to disregard the distinct identity of a corporation for the identity of its shareholders. This test is rooted in the long-standing case law that constitutes the alter ego doctrine (commonly referred to as “veil piercing”). Normally, corporate law strongly resists ascribing to a corporation the interests of its shareholders (financial or otherwise). Indeed, one of the most important contributions of corporate law is its treatment of the corporation as an independent legal person, separate from its shareholders. Nevertheless, veil piercing provides a central and critical exception to this rule that is deeply-rooted, historically pedigreed, and surprisingly consistent across states. When the veil piercing exception applies, courts are permitted to penetrate the separate existence and limited liability shield of a for-profit corporation, holding the corporate entity and its shareholders to be coextensive in regulatory status, jurisdictional residence, and liabilities. To sustain a claim of veil piercing, state corporate law uniformly requires there to be “unity of ownership and interest” between the corporation and its shareholders. If a corporation is operated as the effective alter ego of its shareholders to such an extent that its separate corporate existence ceases to exist as a practical matter, then a veil piercing claim can be established that effectively attributes the corporation’s legal rights and obligations to its shareholders, and vice versa. A veil piercing conclusion effectively holds that there is no practical difference between the corporation and the shareholders themselves.

We suggest that for purposes of defining an “eligible organization” under *Hobby Lobby*, your organizations should follow the corporate law doctrine of veil piercing. Indeed, to make this doctrine administratively feasible, we further suggest that shareholders of a corporation should have to certify that they and the corporation have a unity in identity and interests, and therefore the corporation should be viewed as the shareholders’ alter ego. Shareholders so certifying should also have to pay heed to minority protections under corporate law by certifying that there are no dissenting minority shareholders to the certification and that the certification does not conflict with a corporation’s organization documents or state law. We believe that this type of certification—executed under penalty of perjury—should be sufficient to qualify the organization as an “eligible organization” under the PHSA. In such a circumstance, the identities of the shareholders and the corporation are merged to a sufficient extent that they satisfy the requirements of *Hobby Lobby*.

An alter ego certification sidesteps many of the problems that would be present with an alternative “numerical test” of shareholders in number or control rights that would seek to define a close corporation as an “eligible institution.” Such a test (or tests) will inevitably be seriously under- and over- inclusive, capturing corporations that meet the numerical test but for which shareholders are not the alter egos of the corporation, as well as failing to capture corporations with a relatively large number of shareholders that are all united in their interests and are alter egos of one another. Moreover, veil piercing doctrine already incorporates some numerical rules of thumb, which courts are able to use as flexible (but not dispositive) guideposts: we find in a sample of cases, for example, that it is quite rare for courts to pierce the veil when a corporation has more than a small handful of shareholders. Instead of adopting a rigid numerical rule for what organizational entities can be an

“eligible organization,” a rule should instead use the number of shareholders to create a presumption as to whether the aforementioned certification is sufficient for a PHSA exemption to be granted. Specifically, corporations with a greater number of shareholders should accordingly be put to a higher standard of proof for certification as an “eligible organization.” Such an approach would be consistent with veil piercing doctrine.

Discussion

Burwell v. Hobby Lobby

In *Hobby Lobby*, the Supreme Court held that RFRA applied to three closely-held, for-profit corporations, allowing the entities to claim a religious exemption from providing contraceptive coverage under the Patient Protection and Affordable Care Act.⁶ The Court justified the application of RFRA’s protections to these closely-held, for-profit corporations due to the “sincerity of an asserted religious belief” of the corporation’s shareholders.⁷

While the Court found that RFRA’s protections could apply to a for-profit, closely-held corporation, the majority did so on the basis that the shareholders’ expressed religious beliefs could be attributed to the corporation itself. Indeed, the Court went specifically out of its way to note that the corporation *itself* had no expressed religion, stating that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”⁸ Instead, a corporation only gained such protections due to the conduct and commitments of its shareholders.⁹

To ascertain the religious status of a corporation, the Court focused on the fact that these for-profit, closely-held corporations were expressions of their owners’ identities such that “the religious liberty of the humans who own and control those companies” should be protected.¹⁰ For example, in one telling passage from Justice Alito’s majority opinion, the Court stated:

[The Health and Human Services Agency] 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. In any event, we have no occasion in these cases to consider RFRA’s applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.¹¹

⁶ Pub. L. No. 111–148, 124 Stat. 119 (2010).

⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

⁸ *Id.* at 2768.

⁹ *Id.* at 2767–69.

¹⁰ *Id.* at 2768.

¹¹ *Id.* at 2774.

The dissent and the Health and Human Services Agency raised questions about how the religious intent of the corporation should be determined, particularly if there were any disputes among the shareholders that should be settled for purposes of identifying the shareholders' interests.¹² The Court rejected such concerns and endorsed state corporate law as the appropriate guide for how a Court and regulators should determine whether a corporation could express the religion of its stockholders. The majority opinion stated that courts and regulators should "turn to" a corporation's organization documents "and the underlying state law in resolving disputes," over whether the corporation itself asserted a religious objection under RFRA.¹³

State Law on the Corporate Form and Veil Piercing

Under state corporate law, shareholders and the corporation are usually treated as separate and distinct entities. The corporation has a separate form which serves to erect a barrier between it and its shareholders' financial, regulatory, and jurisdictional status. Indeed, the fact that shareholders are not normally responsible for the corporation's debts is perhaps the *sine qua non* of corporate law.¹⁴ In exchange for the benefits of limited liability, shareholders agree to respect the corporate form and operate the corporation as a distinct entity, usually through a board of directors. In this regard, shareholders typically have limited ability to control the corporation directly. The board of directors is instead charged with the day-to-day operation of the corporation.¹⁵

Notwithstanding the hallmark importance of separate corporate identity, state corporate law does not always treat the corporation as distinct from its shareholders. Courts will instead "disregard the corporate form if it is abused" through the doctrine of veil piercing.¹⁶ If justified, a court will pierce the corporate veil to attribute the liabilities, residency, or regulatory status of the corporation to its shareholders (and, in some circumstances, vice versa).

Because piercing the corporate veil works against a core tenet of "separateness" in corporate law (and can sometimes result in a harsh penalty for shareholders should they be required to answer for the corporation's liabilities), courts approach the doctrine with some caution.¹⁷ Reflecting this caution, a

¹² *Id.* at 2774, 2797 n.19.

¹³ *Id.* at 2775.

¹⁴ See *Ruppa v. Am. States Ins. Co.*, 284 N.W.2d 318, 324 (Wis. 1979) ("[L]imited liability for members of a corporation is the rule, not the exception.").

¹⁵ Shareholders can override the board of directors of a corporation by electing to operate as a closed corporation and eliminating the board or overriding certain or all of their powers in the corporation's certificate of incorporation.

¹⁶ Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 853 (1982).

¹⁷ This is a common refrain in corporate law. See, e.g., *In re Appalachian Fuels, LLC*, 493 B.R. 1, 18 (B.A.P. 6th Cir. 2013) ("[D]ecisions to look beyond, inside and through corporate facades must be made case-by-case, with particular attention to factual details.") (discussing West Virginia law); *Bridge St. Auto., Inc. v. Green Valley Oil, LLC*, 985 F. Supp. 2d 96, 112 (D. Mass. 2013) (explaining that in Massachusetts the "corporate form [is] an entity of which Massachusetts law is especially protective" and that "corporate veils are pierced only in 'rare and particular situations'"); *Capmark Fin. Grp., Inc. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 347 (Bankr. S.D.N.Y. 2013) (noting "the standard for veil-piercing is very demanding" and "disregard of the corporate form is warranted only in extraordinary circumstances").

necessary predicate to sustaining a veil piercing claim is that shareholders must have operated the corporation in a manner that the corporation itself is the shareholders' alter ego such that the separate corporate form should not be recognized. In the 1921 California case of *Minifie v. Rowley*, 202 P. 673 (Cal. 1921), the Court described a key element of a veil piercing claim:

Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and *vice versa*, the following combination of circumstances must be made to appear. . . . that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased¹⁸

In practice, the requirement that there be a “unity of interest and ownership” requires a bona fide alignment between the interests of a corporation and its shareholders—precisely the standard used in *Hobby Lobby*. A single shareholder owning a majority of stock is not enough to pierce the corporate veil, nor is simple control.¹⁹ As one court put it, “the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not, and should not, destroy its separate existence.”²⁰ Instead, for a finding of mutual identity sufficient to pierce the corporate veil “it must further appear that the [corporation and shareholders] are the ‘business conduits and *alter ego* of one another.’”²¹

Moreover, although the dictates of corporate law have developed differently in every state, there appears to be considerable uniformity across jurisdictions about the necessary considerations to invoke veil piercing.²² For present purposes, this uniformity is important if state corporate law is to serve as a guidepost to when (and under what circumstances) corporate entities receive exceptional status under a federal statute. It is notable that in other areas of federal law, such as tax and environmental regulation, the Court has similarly endorsed veil-piercing doctrine to determine when there is sufficient

¹⁸ *Minifie v. Rowley*, 202 P. 673, 676 (Cal. 1921).

¹⁹ See also *Dry Handy Invs., Ltd. v. Corvina Shipping Co. S.A.*, 988 F. Supp. 2d 579, 583-84 (E.D. Va. 2013) (“one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis” to pierce).

²⁰ *Dos Pueblos Ranch & Improvement Co. v. Ellis*, 67 P.2d 340, 342 (Cal. 1937).

²¹ *Id.* (citation omitted). The standard is ubiquitous under veil-piercing doctrine. See also *Ridgerunner, LLC v. Meisinger*, 297 P.3d 100, 115 (Wyo. 2013) (courts may pierce the veil when “corporations have not been operated as separate entities . . . and therefore, are not entitled to be treated as such”); *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wash. App. 475, 486 (Wash. Ct. App. 2013) (courts may apply alter ego theory “when ‘the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist’”); *Timber Integrated Invs., LLC v. Welch*, 737 S.E.2d 809, 817 (N.C. Ct. App. 2013) (applying the doctrine when a corporation “is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared policy or statute of the State”); *My Father’s House No. 1 v. McCardle*, 986 N.E.2d 1081, 1089 (Ohio Ct. App. 2013) (“A corporation is an individual’s alter ego when ‘the individual and the corporation are fundamentally indistinguishable.’”).

²² See WILLIAM MEADE FLETCHER, *Piercing the Corporate Veil, Alter Ego or Mere Instrumentality Test*, in *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 41.10 (Sept. 2014) (compiling the laws of all 50 states on this issue).

nexus between interests of the shareholder and the corporation to treat regulatory status, rights and duties as coterminous.²³

Veil piercing thus offers an appropriate state law vehicle for the required determination under *Hobby Lobby* as to whether the religion of a corporation's shareholders should be attributed to the corporation itself. Normally, the corporate veil will function to create a separate form that is distinct from the shareholders. The religion of the shareholders cannot be attributed to the corporation under state corporate law. Instead, and as the Supreme Court recognized, it is only when the identity of the corporation and its shareholders are alter egos that the religion of the shareholders should be attributable to the corporation under corporate law.

Veil Piercing Doctrine and Hobby Lobby

We submit that the utilization of veil piercing doctrine to implement the *Hobby Lobby* ruling and to define an "eligible institution" under the PHSA leads to a number of prescriptive conclusions for purposes of your rulemaking.

Requirement of an Affirmation

To claim whether a corporate entity is an "eligible institution," an affirmation should be required of shareholders in which they assert—under penalty of perjury—religious principles of commitment for the corporation. Under state corporate law, shareholders can express their interests through written consent or by voting at a special meeting. Depending upon the type of corporation and the form of the shareholder expression, the shareholders' action could be either precatory or binding on the board. In the latter case, the affirmation should be made directly by shareholders and include the appropriate resolutions from the board of directors of the corporation either adopting such religious principles on behalf of the shareholders or acknowledging that such board action is not necessary under state law.

The affirmation for purposes of being an "eligible institution" should be executed by corporate shareholders and should be informed by veil piercing principles.²⁴ Otherwise, there is no support under state corporate law to look through the corporation for these purposes and attribute the religion of the shareholders to the corporation. Accordingly, the affirmation should assert the following: 1) the corporate entity has an expressed religious identity or principle, 2) this principle should be recognized because the corporate entity is the alter ego of the shareholders with indistinguishable interests and

²³ See, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 (1977) (holding that if a corporate entity is a taxpayer's alter ego, then it is appropriate to ascribe the entity's assets to the taxpayer for tax collection purposes); *United States v. Bestfoods*, 524 U.S. 51 (1998) (holding that veil piercing doctrine in state law should constitute the key guidepost for determining whether a parent corporation was an "operator" of a polluting facility under § 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980).

²⁴ In many instances, the corporation may be a group of corporations; that is, a number of subsidiaries owned ultimately by one corporation. We would require an affirmation for each corporation up through the chain to the shareholders who ultimately control these corporations.

commitments, and 3) the assertion of this principle does not conflict with the corporation's governing documents or state law.²⁵

In addition, one of the core principles of corporate law is the protection of minority shareholders. Under state corporate law, when majority shareholders act to their own benefit to the exclusion of minority shareholders, the majority shareholders are required to show that the action was entirely fair to minority shareholders.²⁶ Minority shareholders often also protect themselves by inserting provisions in organizational documents which require that certain corporate actions require minority shareholder consent.

These strong principles of minority protection in corporate law have application for setting the requirements of an affirmation by a corporation's shareholders that the corporation is an "eligible institution." We believe the affirmation should also include a statement that no shareholders have objected to the assertion of this religious principle.²⁷ Such a statement should be included for two reasons attributable to corporate law and the *Hobby Lobby* opinion. First, under *Hobby Lobby*, we believe that a corporation which has a dissident minority shareholder does not have the identity of interests which permits the corporation to adopt a religious principle. Second, we believe that when shareholders are divided on a religious issue, it is impossible to attribute a definitive, singular religious intent to a corporation as corporate law does not have a means to address this situation and impose the will of the dominant shareholders on the minority to the minority's detriment.²⁸

The Role of Numbers

In your release, you put forth two possible paths for the definition of an "eligible institution" by looking to define what is a "close corporation" and making that definition coincide with what is an

²⁵ One might legitimately question whether affirmations of the type we recommend could enhance the personal liability exposure for the affirming shareholders in unrelated litigation brought by unsatisfied corporate creditors, regulators, or other third parties seeking to pierce the corporate veil. We concede it is likely that the affirmation we envision could constitute probative evidence in such third-party claims. Nevertheless, we note that such litigation is highly fact-intensive, and the affirmation would constitute only one, albeit important, piece of probative evidence. The existence of a "unity of ownership and interest" between the shareholder(s) and corporation is also but a necessary (and not a sufficient) condition to pierce the corporate veil. A plaintiff must also show that failure to allow piercing would lead to an inequitable result, sanctioning a fraud or promoting an injustice. Consequently, the affirmation we propose would generally be insufficient alone to trigger liability. If such affirmation increases shareholders' liability exposure, this may actually be a strength of our proposal, since it would make the attestation a more accurate screen to select only those shareholders who hold their beliefs sincerely, and not those who wish to act insincerely and strategically solely to reduce their perceived regulatory burdens. Only if their religious beliefs were sufficiently unified, committed, and devout would shareholders agree to bear the risk of increased liability exposure should a certification be forthcoming. In any event, we believe -- consistent with the *Hobby Lobby* majority -- that such issues are competently handled by state courts applying state corporate law.

²⁶ See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971).

²⁷ There should further be a requirement to update the affirmation upon any change in facts which would affect the truth of the statements made in the affirmation.

²⁸ For example, the signatories to this letter would likely not be uniform in their religious beliefs with respect to use of contraception. We also believe attributing a religious principle to the corporation in such a circumstance implicates the Constitution's prohibitions on forced worship.

“eligible institution.” One possible definition would look at the aggregate number of shareholders.²⁹ Another definition would look at whether the asserting shareholders, no matter how many, held a controlling interest in the corporation.³⁰ Under the dictates of *Hobby Lobby* and state corporate law, we believe that neither test is appropriate. Instead, the test should not be whether a close corporation exists, but whether there is an identity of interests between shareholders and the corporation such that the corporation is the alter ego of the shareholders. While a large number of shareholders may make such an identity of interests harder to establish, it should still nevertheless be possible. Such a finding is in accord with the requirements of *Hobby Lobby* and state corporate law, both of which look at the nature of the relationship between a corporation and its shareholders.

Nonetheless, prior court cases addressing veil piercing inform this question. In order to obtain information on this issue we reviewed veil piercing cases for 2013 according to a coding metric used by a prior and prominent study of veil piercing.³¹ We found twenty-six cases where the issue was raised. Of these only three cases were successful. The average number of shareholders in successful cases was 1.33 while the maximum was two. In two successful cases there was only one shareholder.

These cases show that, in practice, proving an identity of interests can be difficult as the number of shareholders climbs higher. Because of this, your organizations should consider, instead of relying on a strict number test, requiring more evidentiary proof from an applicant having more than a specified number of shareholders that a bona fide alignment exists between the interests of a corporation and its shareholders. Using *Hobby Lobby* as a benchmark, we would suggest that this greater evidentiary burden should apply to any corporation having only a handful of shareholders.³² Such proof could take the form of in-person interviews or notarized documentation.³³

Conclusion

In summary we believe that your organizations should look, as the Supreme Court’s majority opinion in *Hobby Lobby* dictates, to corporate law for determining when it is appropriate to disregard the distinct identity of a corporation for the religious identity of its shareholders. For the aforementioned reasons, this inquiry should result in relying on the law of veil piercing and protection of corporation shareholder minorities for guidance on the definition of an “eligible institution.” We further

²⁹ *Proposing Release* at 51,122.

³⁰ *Id.*

³¹ See Peter B. Oh, *Veil Piercing*, 89 TEX. L. REV. 81 (2010). Specifically, we ran a search in Westlaw for the phrase, “pierc! /s veil’ and ‘disregard! /s (entity entities),” during the year 2013 and examined each case in which the phrase appeared.

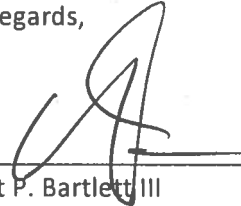
³² We note that in *Hobby Lobby* itself, *Hobby Lobby* and *Mardel* were owned by a single shareholder for the benefit of the Green family. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013). *Conestoga Wood Specialties* appeared to have five shareholders, all members of the same family. *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F. 3d 377 (3rd Cir. 2013).

³³ To the extent that your agencies still look to definitions of close corporation we note that state law definitions are more appropriate than IRS or other regulations that you refer to in your release. See, e.g., DEL. CODE ANN. tit. 8, §§ 341-356 (West 2014) (setting forth the requirements for a close corporation).

think that this militates a certification requirement for "eligible companies," but not a numbers test for shareholders.

We would be happy to discuss our comment further if you wish or provide additional information. We can be reached at the address above or email addresses below our names.

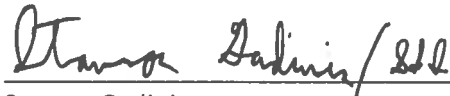
Kind Regards,



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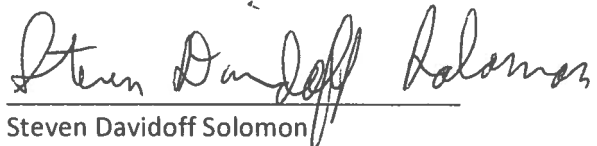
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