

Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
ATTN: CMS-9940-P  
PO Box 8010  
Baltimore MD 21244-1850  
Submitted Electronically

RE: Comment on the definition of “eligible organization” for purposes of Coverage of Certain Preventative Services Under the Affordable Care Act. [File Code CMS-9940-P]

Dated: October 21, 2014

Dear Sir or Madam,

We are a group of law professors who share a great interest in the impact of corporate law on free exercise rights. As such we submit these comments on the proper accommodation process to be utilized by for-profit businesses that have religious objections to providing some or all of the required contraceptive insurance coverage under the Affordable Care Act<sup>1</sup> and wish to exercise their rights arising under the Religious Freedom Restoration Act (“RFRA”)<sup>2</sup> to seek an accommodation. We write today to urge you to craft an accommodation process for those businesses that embodies the reasoning set forth in the Supreme Court’s opinion in *Burwell v. Hobby Lobby Stores, Inc.*<sup>3</sup> and that is consonant with fundamental principles of corporate law.

In *Hobby Lobby*, which involved claims by the Green family, owners of Hobby Lobby craft stores and a Christian bookstore chain named Mardel, and the Hahn family, owners of a woodworking company named Conestoga Wood Specialties, the Supreme Court held that RFRA requires that certain for-profit entities be given an exemption from the Affordable Care Act’s requirement that they provide insurance coverage without cost-sharing for preventative care, including certain forms of contraception to which they object.<sup>4</sup> We support the Department’s attempts, evident in the proposed regulations, to distill the relevant aspects of the *Hobby Lobby* opinion and to craft an accommodation process that reflects the Court’s holding that a closely held, for-profit corporation has standing to raise statutory religious free exercise rights. The task of the accommodation process is to bridge the gap between the Supreme Court’s approach to

---

<sup>1</sup> 42 U.S.C. § 300gg-13(a)(4) (2014).

<sup>2</sup> 42 U.S.C. § 2000bb-1 (2014).

<sup>3</sup> 134 S. Ct. 2751 (2014).

<sup>4</sup> *Id.* at 2759-60.

corporate religious rights and the requirements of the variety of state laws applicable to eligible entities.

A guiding principle for this process should be *identity of interests*. The key features of the closely held, for-profit entities emphasized in the *Hobby Lobby* opinion are as follows: (1) they were entirely family-owned, (2) they consisted of a small number of shareholders, (3) the shareholders and the board of directors were co-extensive, (4) the family/shareholders/directors were unanimous in their religious convictions,<sup>5</sup> (5) the family/shareholders/directors were unanimous in wishing to seek an exemption from the contraceptive coverage requirement, and (6) the companies had long held themselves out to employees, customers, and the public as companies operating under religious principles that constrained their business behavior in accordance with the religious beliefs of equity holders/owners, thereby providing concrete evidence of their religious commitments.

Hewing closely to the facts and holding of the Supreme Court's opinion in *Hobby Lobby*, the Department should limit any accommodation for for-profit entities only to those companies that meet each of these criteria, including being family-owned; the close ties between family members who share a religious faith and operate a religiously-influenced business are the best assurance of the close nexus on which corporate religious rights depend.<sup>6</sup>

If the Department does not limit the accommodation to family-owned entities, we urge the Department to adopt the following proposed criteria to identify eligible for-profit entities: accommodations should only be available to entities (1) with a limited number of equity holders/owners,<sup>7</sup> (2) that demonstrate religious commitment, and (3) submit evidence of

---

<sup>5</sup> While not uniform in adherence to all stated religious principles, it is undisputed that the record of the corporate plaintiffs in *Hobby Lobby* documented a commitment to religious principles through business operations. The Hahn family's evidence included a "Vision and Values" statement that stated the company's goal was to "ensur[e] a reasonable profit in [a] manner that reflects [their] Christian heritage," *id.* at 2764, and a board-approved "Statement on the Sanctity of Human Life" that averred that the Hahn family believes life begins at conception, *id.* at 2765-65. As for the Green family, *Hobby Lobby*'s "statement of purpose" stated that the Greens were committed to "honoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles," and every member of the Green family had "signed a pledge to run the business in accordance with the family's religious beliefs and to use the family assets to support Christian ministries." *Id.* at 2766. In practice these principles mean that *Hobby Lobby* and *Mardel* stores are closed on Sundays, that the businesses do not "engage in profitable transactions that facilitate or promote alcohol use," that they contribute profits to Christian causes, and that they have bought hundreds of full-page newspaper ads proselytizing Christianity to readers. *Id.*

<sup>6</sup> See Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1193-94 (2013) (noting that "family businesses are an extension of family relationships").

<sup>7</sup> We use the term equity holders because some business entities are organized as LLCs, which have members, not shareholders, and some are structured as partnerships and therefore have partners instead of shareholders. Similarly, some for-profit entities that may seek an exemption may be owned by trusts, in which case the equity holders would

unanimous consent of equity holders to seek an accommodation on an annual basis. These criteria mirror the criteria relevant to the Supreme Court’s holding in *Hobby Lobby* as closely as possible without limiting the accommodation process only to family-owned entities.

A preliminary issue warrants further explication before discussing the suggested criteria and their application in more detail. As the Department is aware, the Supreme Court’s opinion in *Hobby Lobby* relied heavily on the fact that the corporate entities raising such claims were “closely held.”<sup>8</sup> This subset of the general corporate form informed the holding that Hobby Lobby and similar for-profit entities were eligible to seek exemptions from otherwise generally applicable laws, including the contraceptive coverage requirement of the Affordable Care Act. Unfortunately, the term “closely held corporation” is not a term with a singular definition across corporate law. Fewer than half the states<sup>9</sup> have a statutorily created corporate form called a “close corporation,” and even for those states that do, the definitions of and requirements for such a business form vary from state to state. None of the statutes allow the stock of a close corporation to be publicly traded, but they vary in the numerical limit on the number of shareholders, from a low of 10<sup>10</sup> to a high of 50.<sup>11</sup> Further, more than half the states do not have a corporate form of this kind. While for-profit entities in a state that does not provide a statutory “close corporation” form are permitted to structure their charter so as to operate in a fashion like a close corporation,<sup>12</sup> the standards for determining how to evaluate eligibility for doing so vary by state law. Additionally, the reasoning in *Hobby Lobby* extends to “closely held” entities that are not organized as corporations, such as partnerships and limited liability companies (LLCs), each of which has a unique set of governing state laws.

Most likely, the importance of the “closely held” form in the Supreme Court’s recognition of corporate entities’ RFRA rights turned on a perception of intimacy of ownership rather than a reliance on a formalistic statutory form in state law. The Department need not reconcile fractured state law to create a universally applicable definition of “closely held corporation.” Given that the notion of a “closely held corporation” is more a sentiment than a

---

be the beneficiaries of the trust. Throughout this letter we use the terms “equity holders,” “owners,” and “equity holders/owners” interchangeably.

<sup>8</sup> See, e.g., 134 S. Ct. at 2769.

<sup>9</sup> Twenty states and the District of Columbia have statutory “close corporation” forms. 1 WILLIAM M. FLETCHER, FLETCHER CORP. FORMS ANN. § 6:22 (5th ed. 2014).

<sup>10</sup> See AZ. REV. STAT. §§ 10-1801 *et seq.* (2014).

<sup>11</sup> See GA. CODE ANN. § 14-2-902 (2014); MO. REV. STAT. § 351.755 (2014).

<sup>12</sup> See 1 CLOSE CORP. AND LLCs: LAW AND PRACTICE § 1:19 (3d ed. 2014).

fact of consistent state corporate law, the appropriate task for the Department in this endeavor is to create eligibility criteria for entities seeking an exemption that mirror the form and substance of the entities at issue in *Hobby Lobby*.

Proposed Criteria:

Should the Department choose not to limit the accommodation to family-owned entities, we urge the Department to adopt the criteria outlined in this section. The Court’s decision in *Hobby Lobby* rested on a specific set of premises, developed through the litigation process, that informed the Court’s analysis of the theoretical grounding and practical implications of religious rights for for-profit entities. Since the Department will not have access to the same process for all for-profit entities seeking an accommodation, the Department should adopt criteria that distill the essence of the Court’s reasoning and replicate the evaluation process without the full process record of a court hearing.

Thus, HHS should require (1) all entities seeking an accommodation to be privately held and with a limited number of equity holders, (2) evidence of a commitment to running a for-profit entity with religious principles as part of the entity’s purpose or guiding goals, and (3) unanimous consent by all equity holders to seek an exemption, renewed on an annual basis. We next discuss each of these criterion specifically.

*Privately Held & Size*

The Supreme Court used the term “closely held corporation” in *Hobby Lobby* to capture a number of characteristics, but chief among them was the importance of the fact that Hobby Lobby was a privately held company with a limited number of equity holders.<sup>13</sup> Thus the Department should, as an initial matter, limit the accommodation to privately held entities that have no publicly-traded stock. In addition, the Department should act to limit the absolute number of equity holders permitted, with the number selected being the same for corporations, LLCs, and partnerships. We urge the Department to adopt the following criteria to limit size:

---

<sup>13</sup> *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2765 (2014). (“Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of [Hobby Lobby and Mardel]”); Verified Complaint ¶¶ 2, 38, *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012).

1. If the for-profit entity in question is formed in a state that has a “close corporation” statutory form available, the entity should be required to elect that form. Typically the close corporation form is elected at the time of incorporation, but in some states it can also be elected afterwards.<sup>14</sup> Electing this form signifies the consent of the equity holders to be governed by the rules that apply to close corporations.

2. If the for-profit entity in question is incorporated in a state that has a close corporation statutory form available but in which that form can only be elected at the time of incorporation, the entity should be required to certify that it meets the statutory definition and would be able to obtain close corporation status if it were allowed to do so at the time it seeks to the accommodation.

3. If the for-profit entity in question is incorporated in a state that does not have a close corporation statutory form available, the entity should be required to certify that it meets the statutory definition of a close corporation under Delaware corporate law.<sup>15</sup> Delaware law limits shareholders in a close corporation to 30, which is close to both the average and most common number of shareholders allowed in a close corporation in those states that have such a form and provide a number limit in their statute.<sup>16</sup>

4. For non-corporate for-profit entities like partnerships and LLCs, the entity should be required to (a) certify that if formed as a corporation it would meet the ownership criteria of a close corporation formed in the state, or (b) if no state standards exist, certify that if formed as a corporation, it would meet the ownership criteria of a close corporation under Delaware corporate law.

Before turning to the other criteria, we would like to address the Department’s suggestion that one way of defining eligible for-profit entities would be to specify a “fraction of the ownership interest [to be] concentrated in a limited and specified number of owners.”<sup>17</sup> We agree

---

<sup>14</sup> See, e.g., DEL. CODE ANN. tit. 8, § 344 (2014); KANS. STAT. § 17-7204 (2014); MO. REV. STAT. § 351.755(2) (2014); S.C. CODE § 33-18-103(b) (2014).

<sup>15</sup> See DEL. CODE. tit. 8, § 342 (2014).

<sup>16</sup> DEL. CODE tit. 8, § 342 (2014). See also GA. CODE § 14-2-902 (2014) (capping shareholders at 50); ARIZ. REV. STAT. § 10-1818 (2014) (capping shareholders at 10). Alabama, Nevada, Rhode Island, and Wisconsin also limit shareholders to 30. ALA. CODE § 10A-30-2.02 (2014); NEV. REV. STAT. § 78A.020 (2014); R.I. GEN. LAWS § 7-1.2-1701(e)(1)(ii) (2014); WIS. STAT. § 180.1803 (2014).

<sup>17</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118, 51,122 (Aug. 27, 2014).

with the Department, as explained above, that limiting the total number of equity holders is a necessary part of the qualification process, although it is not sufficient standing alone. We strongly urge the Department, however, not to adopt any form of the “controlling proportion” rule. It is not uncommon for very large privately held corporations to have a majority of shares concentrated in a limited number of shareholders, like a family, but to have the rest of the shares owned by numerous other corporations, venture capital companies, or conglomerates. This ownership structure undermines the associational rationale of the religious rights theory of *Hobby Lobby*, which envisioned a small close-knit group of individuals with shared religious beliefs and individual religious exercise rights acting collectively and unanimously to express those beliefs.

### *Religious Commitment*

Presuming a for-profit entity meets the size limit, the next suggested criteria is that it should also be required to demonstrate some form of pre-existing religious commitment. This is not an inquiry into the sincerity of the religious objection; rather it is a method by which the Department can evaluate whether the for-profit entity is the type of entity that the Court intended to include within the scope of the *Hobby Lobby* ruling. This requirement is consistent with *Hobby Lobby*’s approach, where the Court set forth evidence demonstrating the Green and Hahn families’ pre-existing religious commitments that guided the operation of their businesses. The Department will not have access to the same kinds of litigation record for each entity seeking an exemption. It is important to stress that even religiously-affiliated organizations have recognized in court filings that an entity’s religious beliefs may be fairly ascertained through consulting its governance documents.<sup>18</sup> Therefore, in order to ensure that the eligible entity is the type that *Hobby Lobby* meant to reach, the Department should require that the entity meet at least one of the following proposed requirements:

---

<sup>18</sup> Brief for Knights of Columbus as Amicus Curiae Supporting the Private Parties at 23, *Hobby Lobby*, 134 S. Ct. 2751 (“A corporation also can prove its sincerity by means of its charter, articles of incorporation, bylaws or mission statement. Courts routinely look to those kinds of governance materials . . . to ‘determine the purpose for which a corporation was created.’”) (quoting 1A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 139).

- (1) the entity is formed as a benefit corporation or suitable alternative that specifies pursuit of a religious mission,<sup>19</sup>
- (2) the entity’s formation or governing documents (such as articles of incorporation, articles of organization, bylaws, operating agreement, partnership agreement, charter, etc.) evidence a religion mission, or
- (3) the entity has a unanimously adopted mission statement made publicly available that evidences its religious mission.<sup>20</sup>

### *Accommodation Process Election*

In addition to requiring a for-profit entity to meet the size and religious commitment criteria before being eligible for an accommodation, the Department should require that the entity demonstrate that the equity holders of the entity are *unanimous* in desiring to participate in the accommodation process. The Supreme Court’s approach to corporate religious rights in *Hobby Lobby* is associational in nature: for-profit entities have religious rights because they are a collection of individuals with religious rights.<sup>21</sup> In that sense the entity is merely the vehicle through which a group of individuals with religious rights exercises those rights in a collective manner. *Unanimity of interests* among individual owners is consistent with the Court’s reasoning and best serves the spirit of the ruling. As the Court explained in *Hobby Lobby*: “[I]t is important

---

<sup>19</sup> A benefit corporation is a form that “allows for-profit corporations to consider social responsibility even when sacrificing profit maximization, without violating fiduciary duties to shareholders,” TREATISE ON THE LAW OF CORPORATIONS, § 2:14 (3d ed. 2013). See ARK. CODE ANN. §§ 4-36-101 to -401 (2014); CAL. CORP. CODE §§ 14600 to 14631 (2014); COLO. REV. STAT. § 7-101-503 (2014); DEL. CODE tit. 8, § 362 (2014); D.C. CODE § 29-1301.01 (2013); FL. STAT. § 607.601 to 607.613 (2014); HAW. REV. STAT. §§ 420D-1 to 420D-13 (2013); 805 IL. COMP. STAT. 40 / 1 to 5 (2013); LA. REV. STAT. §§ 12:1801 to 1832 (2013); MD CODE CORPS. & ASS’NS §§ 5-6C-01 to 5-6C-08 (2013); MASS. GEN. LAWS ch. 156E, §§ 1 to 16 (2013); MINN. STAT. 304A.001-.301 (effective Jan. 1, 2015); NEB. REV. STAT. 21-402 to -414 (2014); NEV. REV. STAT. § 78B.010 to .190 (2014); N.J. STAT. ANN. § 14A:18-1 (2013); NY BUS. CORP. LAW § 1701 (Consol. 2013); OR. REV. STAT. § 60.750 to .770 (2014); 15 PA. CONS. STAT. § 3301 (2013); S.C. CODE ANN. § 33-38-110 (2013); TEX. BUS. ORGS. § 3.007(d); UTAH CODE § 16-10b-105 to -402 (2014); VT. STAT. ANN. tit. 11A, § 21.01 (2013); VA. CODE ANN. § 13.1-782 (2013); W. VA. CODE § 31F-1-101 to -501 (2014); S.B. 1238, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (effective Dec. 31, 2014); Conn. Pub. Act. No. 14-217, §§ 140-54 (2014); S.B. 215, 2014 Reg. Sess. (N.H. 2014) (effective Jan. 1, 2015). The benefit form can generally be elected after incorporation. See, e.g., CAL. CORP. CODE § 14603(a) (2014); DEL. CODE tit. 8, § 363 (2014); MASS. GEN. LAWS ch. 156E, § 5 (2014). A similar LLC option also exists. See Jamie Patrick Hopkins, *Low-Profit Limited Liability Companies: High-Risk Tax Fad or Legitimate Social Investment Planning Opportunity*, 2014 CARDOZO L. REV. DE NOVO 35.

<sup>20</sup> For example, a mission statement on a company website would suffice, such as the one that Hobby Lobby provides in its “Our Company” page, if the statement indicated it was adopted unanimously and the entity certifies a statement to HHS to that effect. HOBBY LOBBY, [http://www.hobbylobby.com/our\\_company/](http://www.hobbylobby.com/our_company/) (last visited Oct. 15, 2014).

<sup>21</sup> *Hobby Lobby*, 134 S. Ct. at 2768.

to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. . . . protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.”<sup>22</sup>

Because state corporate law varies on decision-making requirements for different types of entities at different times,<sup>23</sup> the Department cannot assume that existing voting rules for equity holders under state law clearly establish a path to determine the religious identity of an entity. Additionally, where equity holders are motivated to perform conflicting types of religious exercise (or no religious exercise at all), it weakens the religious identity of the entity seeking the accommodation. By forcing the entity to act in observance of one faith over another, or over no faith at all, the entity would be forced to express the religious views of some, but not all, of its constituent owners.

In addition, requiring unanimity among the equity holders prevents any potential fiduciary duty problems for directors or managers when they are not the same individuals as the equity holders. Equity holders and directors/managers have different scopes of authority and corresponding fiduciary duties. Equity holders elect or hire the directors/managers, and the directors/managers are vested with authority to manage the business and affairs of the business.<sup>24</sup> Conflating these two legally distinct roles creates potential problems. For example in a corporation, a subset of shareholders may agree about how they will vote as shareholders, but generally they cannot make agreements about how the board of directors should act, once elected, even if the shareholders will serve as directors. This is one way the law recognizes the

---

<sup>22</sup> *Id.* at 2768. While *Hobby Lobby* seems superficially similar to the Court’s opinion in *Citizens United*, it is in fact substantially distinct in two important ways. First, in *Hobby Lobby* the theory of corporate rights was entirely associational, unlike the theory motivating the Court’s decision in *Citizens United*, where the Court stressed the benefit to the public of allowing corporate speech. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349-50 (2010). In addition, *Hobby Lobby*, by its own terms, applies only to “closely held corporations”—while corporate law does not provide a singular definition, it is a limiting principle in the ways laid out in these comments. *Citizens United*, on the other hand, applied to all corporate forms. Unanimity therefore is an appropriate requirement in a situation in which the rights at issue are entirely associational, only available to small close-knit entities, and have no public benefit.

<sup>23</sup> For example, LLCs can be member-managed or manager-managed. The governance structure elected by the member/owners and the private agreement (i.e., the operating agreement) introduce complicity unique to the LLC form. *See e.g.* Uniform Limited Liability Company Act § 203 (requiring an LLC to elect to be manager-managed) and § 404 (establishing the default rule that LLCs are member-managed unless elected otherwise) (1996).

<sup>24</sup> For this rule in the context of corporations, *see, e.g.*, DEL. CODE tit. 8, § 141(a) (2014). Manager-managed LLCs operate in an analogous manner.

legal distinction between equity holder and director/manager, even if the same person occupies the two different positions.<sup>25</sup>

An important exception to the limitation of shareholder agreements, however, is where there is unanimous consent among the shareholders.<sup>26</sup> With unanimous consent, equity holders assume some of the power otherwise reserved for directors/managers. Without unanimous consent, it is unclear how the equity holders would mandate directors or managers to act, and equally important, what the fiduciary obligations of those acting would be. For example, in the absence of unanimity, an objecting equity holder could bring a derivative suit against a director or manager for failing to serve the best interests of the entity if the director or manager followed a demand to seek a religious accommodation from some, but not all, equity holders and did not make an independent, good faith judgment about seeking the accommodation. Requiring unanimity avoids this problem entirely while also embodying the theory of corporate RFRA rights reflected in *Hobby Lobby's* reasoning.

The line between equity holder and directors/managers was not clearly articulated in the *Hobby Lobby* opinion, likely because the Green and Hahn families served both roles: equity holders and directors of the corporations at issue. But the Court's holding rests on the religious rights of the equity holders, and it emphasized that all the equity holders in question held a single view on the issue of what forms of contraceptive protection should not be covered on the basis of their shared faith. Thus the Department's regulations must clearly address how best to attribute the religious beliefs of the equity holders to the directors/managers in a way that is consistent with established laws recognizing the legally distinct roles.

For this reason, unanimity is the best approach. The Department should require that equity holders (for a partnership that means the partners, for an LLC the members, and for a corporation the shareholders) unanimously approve the pursuit of the accommodation. In the case of a corporation with a board of directors, such approval should take the form of a unanimous agreement among the shareholders embodied in the charter (e.g., certificate or

---

<sup>25</sup> See e.g., *H.M. Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 152 (Del. Ch. 2003).

<sup>26</sup> WILLIAM KLEIN, J. MARK RAMSEYER, STEPHEN M. BAINBRIDGE, *BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIP AND CORPORATIONS* 599-600 (2012); see also MODEL BUS. CORP. ACT § 7.32 (2002). Unanimous shareholder agreements are subject to additional restrictions required under state law and will vary from state to state. See e.g., TENN. CODE ANN. § 48-17-302 (2014 West); N.Y. BUS. CORP. LAW § 620 (2014 McKinney).

articles of incorporation), bylaws, or a written agreement and otherwise complying with the statutory requirements for a valid shareholder agreement under the law of the state of incorporation. The agreement should be presented to the board of directors asking them to take the specified action (seeking an accommodation), which should be followed by the board vote and action.<sup>27</sup> In the case of a manager-managed LLC, the unanimous vote of the members should be presented to the managers, or similar governing body, asking them to take the specified action (seeking an accommodation), which should be followed by the managers' vote and action. Unanimous approval by equity holders in all entities should be made anew every year, since ownership of a for-profit entity can change over time.

### *Special Cases*

Two subcategories of corporations bear special note. One is an entity in which one or more of the equity holders are for-profit entities themselves. The vision of corporate RFRA rights in *Hobby Lobby* is that of a small, close-knit group of individuals with a shared faith that they unanimously desire to collectively express through a for-profit entity. Allowing any entities in which shareholders, members or partners are themselves for-profit entities risks diluting the identity of religious interests protected by the Court. We would therefore recommend that the Department eliminate from consideration any such entities.

However if the Department chooses not to limit the equity holders in this way, we believe that the associational theory of corporate religious exercise rights underlying *Hobby Lobby* requires that each entity that is an equity holder of an entity seeking an accommodation meets the same criteria as the accommodation-seeking entity, including: (1) satisfying the privately held requirement and size limitations, (2) providing evidence of religious commitment, and (3) presenting an annual unanimous equity holder agreement to vote in favor of seeking an exemption in its role as an equity holder of the accommodation-seeking entity.

The other subcategory is the situation in which a for-profit entity seeking an accommodation is partly or wholly owned by a trust.<sup>28</sup> In that case the current beneficiaries of the trust should be considered the relevant owners for this purpose. Consent of such a trust as an

---

<sup>27</sup> Or as required under the charter of the requesting corporation, which may require different procedures for shareholder resolutions and board action.

<sup>28</sup> In *Hobby Lobby* the Green family operated the company through a management trust, but all the family members were also the trustees, and therefore could act on their own behalf in seeking an accommodation. 134 S. Ct. at 2765 n.15.

equity holder should be obtained through either a trustee who is specifically authorized to give such consent in the governing trust document, or with unanimous approval of existing beneficiaries of the trust at the time of the vote.

### Conclusion

In summary, we urge the Department to craft an accommodation process that gives life to the particular associational theory of corporate rights animating the *Hobby Lobby* decision. The process should allow only small groups of equity holders who share the same religious convictions, have publicly operated their business according to those principles, and are unanimously in favor of seeking an accommodation to qualify as eligible entities. Our proposal provides a thorough, practical and clear set of guidelines for for-profit entities wishing to seek an accommodation that is consistent with state corporate law principles and the *Hobby Lobby* ruling in both spirit and form.

Sincerely,\*

Katherine Franke  
Isidor and Seville Sulzbacher Professor of Law  
Columbia Law School

Kara Loewentheil  
Research Fellow  
Columbia Law School

Robert E. Scott  
Interim Dean and Alfred McCormack Professor of Law  
Director, Center for Contract and Economic Organization  
Columbia Law School

Ronald J. Gilson  
Meyers Professor of Law and Business  
Stanford Law School  
Stern Professor of Law and Business  
Columbia Law School

James D. Cox  
Brainerd Currie Professor of Law  
Duke University School of Law

Anne M. Tucker  
Associate Professor of Law  
Georgia State University College of Law

Kent Greenfield  
Professor of Law and Dean's Research Scholar  
Boston College Law School

Elizabeth Pollman  
Associate Professor of Law  
Loyola Law School, Los Angeles

Brandon L. Garrett  
Professor of Law  
University of Virginia School of Law

Frank Partnoy  
George E. Barrett Professor of Law and Finance  
University of San Diego

Kathryn Judge  
Associate Professor of Law and Milton Handler Fellow  
Columbia Law School

Jeffrey N. Gordon  
Richard Paul Richman Professor of Law  
Columbia Law School

Curtis J. Milhaupt  
Parker Professor of Comparative Corporate Law and Fuyo Professor of Japanese Law  
Columbia Law School

Avery W. Katz  
Milton Handler Professor of Law  
Columbia Law School

Deborah Zalesne  
Professor of Law  
CUNY School of Law

William W. Bratton  
Nicholas F. Gallicchio Professor of Law and Co-Director, Institute for Law & Economics  
University of Pennsylvania Law School

Urska Velikonja  
Assistant Professor of Law  
Emory University School of Law

Brian JM Quinn  
Associate Professor of Law  
Boston College Law School

Douglas M. Branson  
W. Edward Sell Chair in Business Law  
University of Pittsburgh

Antony Page  
Vice Dean & Professor of Law  
Indiana University Robert H. McKinney School of Law

Stefan J. Padfield  
Professor of Law  
University of Akron School of Law

Afra Afsharipour  
Professor of Law & Martin Luther King, Jr. Hall Research Scholar  
University of California, Davis, School of Law

Stephen F. Diamond  
Associate Professor of Law  
Santa Clara University School of Law

Jennifer Taub  
Professor of Law  
Vermont Law School

Alan R. Palmiter  
Howard L. Oleck Professor of Business Law  
Wake Forest University School of Law

Eric C. Chaffee  
Professor of Law  
The University of Toledo College of Law

Jayne W. Barnard  
Cutler Professor of Law  
William & Mary Law School

Joseph K. Leahy  
Associate Professor  
South Texas College of Law

Kellye Testy  
Dean, School of Law  
Judge James W. Mifflin University Professor of Law  
University of Washington School of Law

Cheryl L. Wade  
Harold F. McNiece Professor of Law  
St. John's University School of Law

Jeff Schwartz  
Professor of Law  
University of Utah S.J. Quinney College of Law

Anita K. Krug  
Associate Professor of Law  
University of Washington School of Law

Theresa Gabaldon  
Lyle T. Alverson Professor of Law  
The George Washington University Law School

Joe Morrissey  
Professor of Law  
Stetson University College of Law

Benjamin Means  
Associate Professor of Law  
University of South Carolina School of Law

Hilary J. Allen  
Associate Professor of Law  
Suffolk University Law School

Deborah A. DeMott  
David F. Cavers Professor of Law  
Duke University School of Law

Jennifer J. Johnson  
Dean and Erskine Wood Sr. Professor of Law  
Lewis and Clark Law School

Mohsen Manesh  
Assistant Professor and Portland Program Faculty Director  
University of Oregon School of Law

Caitlin E. Borgmann  
Professor of Law  
CUNY School of Law

Margaret V. Sachs  
Robert Cotten Alston Professor of Law  
University of Georgia School of Law

Joan MacLeod Heminway  
W.P. Toms Distinguished Professor of Law  
The University of Tennessee College of Law

Margaret M. Blair  
Professor of Law and Milton R. Underwood Chair in Free Enterprise  
Vanderbilt University Law School

Lynne L. Dallas  
Professor of Law  
University of San Diego School of Law

Faith Stevelman  
Visiting Professor of Law  
University of Washington School of Law

Erika George\*\*  
Professor of Law and Co-Director Center for Global Justice  
S.J. Quinney College of Law, The University of Utah

\*(Affiliations with universities are listed for identification only. No signer of this letter claims to speak for the university at which he or she works).

\*\* Denotes signatures added after submission of the comments to HHS.