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ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

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July 31, 2018

The Honorable Alex M. Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

RE: *Proposed Rule, Compliance with Statutory Program Integrity Requirements*
[Docket No.: HHS-OS-2018-0008]

Dear Secretary Azar:

As the Ranking Member of the Committee with jurisdiction over the Title X Family Planning Program (Title X), I write to share my grave concerns regarding the Administration's proposed changes to the program and express my strong opposition to the proposed rule published on June 1, 2018.[1] This proposed rule defies Congressional intent, expands the authorities of the Department of Health and Human Services (HHS) in an unprecedented manner, and has far-reaching and detrimental implications for the network of Title X providers and the patients they serve.

Enacted by Congress in 1970 with broad bipartisan support, Title X remains the only domestic federal program dedicated solely to family planning and related preventive health services. For nearly 50 years Title X grants have enabled low-income individuals to receive critical health services such as contraceptive care, sexually transmitted infection (STI) testing and treatment, cervical and breast cancer screenings, and pregnancy testing and counseling. In 2016 alone, Title X-funded clinics served four million patients, the large majority of which had incomes at or below the federal poverty level guidelines. For six in 10 women obtaining

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[1] *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (proposed June 1, 2018).

contraceptive care at a Title X clinic, that site was their only source of medical care over the previous year.[2]

Unfortunately, the proposed rule seeks to overhaul the network of providers participating in Title X and would restrict access to the critical health care services that are currently provided through Title X-funded projects. The proposed rule raises a number of questions regarding its compliance with the Title X statute, and if implemented, would undermine Congress' true intent for the program.

First, the proposed rule appears to permit Title X applicants to refuse to provide the broad range of contraceptive methods that have served as the cornerstone of the program since its inception. Section 1001(a) of the Title X statute states that family planning projects "shall offer a broad range of acceptable and effective family planning methods and services."[3] However, the proposed rule appears to blur the meaning of "methods and services" with "choices" by defining the means of family planning to include "a broad range of acceptable and effective choices, which may range from choosing not to have sex to the use of other family planning methods and services to limit or enhance the likelihood of conception (including contraceptive methods, and natural family planning or other fertility awareness-based methods), and the management of infertility (including adoption)."[4]

When coupled with the proposed rule's elimination of references to "medically approved" family planning methods from current regulations, it seems possible that future Title X applicants could be awarded grants even if that project only offers natural family planning, along with abstinence-only education and adoption services. This is not the broad range of family planning methods Congress contemplated when enacting Title X and could deny patients access to a truly broad range of options of effective and FDA-approved contraceptive methods.

Second, the proposed rule amends the definition of "low-income family" to include women whose employers object to providing insurance coverage for contraception, contrary to the requirements of the Affordable Care Act (ACA). When creating the Title X program, Congress recognized the importance of ensuring broad access to family planning services, but also the barriers to care that low-income individuals often face. For this reason, Title X was

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[2] Megan L. Kavanaugh, et al., *Use of Health Insurance Among Clients Seeking Contraceptive Services at Title X-Funded Facilities in 2016,* Perspectives on Sexual and Reproductive Health, Vol. 50, No. 3, Sept. 2018 (https://onlinelibrary.wiley.com/doi/epdf/10.1363/psrh.1206).

[3] 42 U.S.C. § 300(a).

[4] 83 Fed. Reg. 25,529 (proposed June 1, 2018).

designed to provide high-quality, confidential family planning services to "all those who want them but cannot afford them."[5]

By redefining "low-income family" to include any woman whose employer refuses to provide contraception coverage for religious or moral reasons, regardless of that woman's income, HHS is attempting to ameliorate the void created by this Administration's own Interim Final Rules that permit broad exemptions to the ACA's preventive services guarantee and have resulted in the loss of contraceptive coverage for certain women.[6] Title X was not created for this purpose and cannot serve higher income, insured individuals who should have coverage through their employers. Including this cohort of women in the definition of "low-income family" means that fewer dollars will be available for the low-income individuals the program was designed to serve. The Title X statute states that the definition of "low-income family" must ensure that "economic status shall not be a deterrent to participation."[7] However, amending the definition as proposed would stretch the program's already limited resources and would shift costs onto the federal government.

Third, the proposed rule imposes strict physical separation requirements for Title X-funded entities that were not intended by Congress while also providing HHS with broad discretion to evaluate compliance. Under the proposed rule, Title X grantees or subrecipients must have both physical and financial separation between Title X services and any abortion services or vague "activities related to abortion" performed by that entity in order to ensure that Title X funds "are not being used to build infrastructure that supports, or may be used to support, the abortion business of a Title X grantee or subrecipient."[8] The proposed rule implies that this would require facilities to have separate examination and waiting rooms, separate office entrances and exits, separate personnel, and separate health care records and workstations if that entity separately offers abortion services or other "activities related to abortion".[9] The proposed rule would then instruct HHS to employ a subjective "facts and circumstances" test to determine whether a Title X project is in compliance with these separation requirements.

The Title X statute does not require physical separation to delineate between services that can be funded by Title X and those that cannot. Congress contemplated that Title X funds could be used to cover costs other than direct services and the stringent separation requirements

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[5] Richard Nixon, *Statement on Signing the Family Planning Services and Population Research Act of 1970* (Dec. 26, 1970).

[6] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 82 Fed. Reg. 197 (interim final rule, Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 92 Fed. Reg. 197 (interim final rule, Oct. 13, 2017).

[7] 42 U.S.C. § 300a-4(c)(2).

[8] 83 Fed. Reg. 25,519 (proposed June 1, 2018).

[9] *Id.*

proposed would have a significant and costly impact on many family planning providers and would impede their ability to carry out otherwise permissible day-to-day operations of their facilities. However, this also appears to be the goal of the proposed rule: to ensure family planning providers that offer abortion services – even though this care is not funded through the Title X program – are ineligible from receiving Title X funds. This will significantly limit the network of family planning providers in the Title X program and will restrict access to care from many of the highest quality providers that are best situated to provide it.

Fourth, the proposed rule changes the current Title X regulations to "eliminate the requirement that Title X projects provide abortion referral and counseling" and "prohibit recipients from using Title X funds to perform, promote, refer for, or support abortion as a method of family planning."[10] This stands in stark contrast to Congress' longstanding intent that "all pregnancy counseling shall be nondirective" and runs afoul of current appropriations law.[11] While Congress has consistently restricted Title X funds from being "expended for abortions," Congress has never prohibited the use of Title X funds for counseling or referrals for abortion and has never amended the statute to reflect this.[12]

The proposed rule would limit the information individuals are able to receive from their providers and under this rule, only if a patient clearly states that she has already decided to have an abortion can her provider share with her "a list of licensed, qualified, comprehensive health service providers, some (but not all) of which provide abortion in addition to comprehensive prenatal care."[13] This restricts the ability of providers to give the best possible care, and as a result patients will lack accurate, complete, and specific information about their options. HHS argues that "[r]eferrals for abortion are, by definition, directive"[14] but at the same time does not find that the referral of pregnant patients for prenatal and/or social services, as also required under the proposed rule, to be similarly directive. This inconsistent interpretation appears designed to steer a pregnant patient towards prenatal care, regardless of her wishes.

Finally, the proposed rule provides HHS with broad and unprecedented discretion to disqualify Title X applicants while simultaneously encouraging "diverse applicants." The proposed rule states that HHS seeks to "increase competition and rigor among applicants, encouraging broader and more diverse applicants and better ensuring the selection of quality applicants."[15] The Title X statute only states that in making grants and contracts HHS should

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[10] 83 Fed. Reg. 25,507 (proposed June 1, 2018).

[11] Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348, 716-717 (2018).

[12] See *id.*

[13] 83 Fed. Reg. 25, 518 (proposed June 1, 2018).

[14] 83 Fed. Reg. 25, 506 (proposed June 1, 2018).

[15] 83 Fed. Reg. 25,511 (proposed June 1, 2018).

consider "the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance."[16] Over the program's nearly 50 year history, Title X grantees have developed specific expertise and experience and HHS's apparent assertion that merely having more diversity in its applicant pool will result in better quality projects is unfounded.

I am also concerned by the broad discretion this proposed rule provides HHS when selecting applicants. The proposed rule states that "Any grant applications that do not clearly address how the proposal will satisfy the requirements of this regulation shall not proceed to the competitive review process, but shall be deemed ineligible for funding."[17] This standard appears to be subjective and unclear, and the proposed rule fails to clarify how applicants can ensure they have clearly addressed how the project will satisfy the requirements to HHS's satisfaction. When considered in tandem with HHS's interest in soliciting new applicants that may not be able or committed to providing high-quality family planning care, it is concerning that HHS may have broad discretion to determine what applications reach the next step in the review process without any objective justification.

In addition to the concerns noted above, the proposed rule undermines confidentiality protections, requires Title X-funded entities to withhold full and accurate medical information from patients, and stigmatizes patients who seek information about their pregnancy options. In summary, this proposed rule weakens the critical safety net that the Title X program provides to millions of women, men, and adolescents each year and stands in stark contrast to the goals of the program as Congress intended.

For these reasons, I strongly oppose the proposed rule and urge you to reconsider the implementation of this draconian and ill-informed proposal.

Sincerely,

Frank Pallone, Jr.
Ranking Member

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[16] 42 U.S.C. § 300(b).

[17] 83 Fed. Reg. 25,517 (proposed June 1, 2018).