

# United States Senate

WASHINGTON, DC 20510

July 31, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Alex Azar II  
Secretary of Health and Human Services  
Attention: Family Planning  
U.S. Department of Health and Human Services  
Hubert H. Humphrey Building, Room 716G  
200 Independence Avenue SW  
Washington, DC 20201

**RE: HHS-OS-2018-0008, Proposed Rule for Compliance With Statutory Program Integrity Requirements**

Dear Secretary Azar,

As U.S. Senators, we are deeply concerned the Trump-Pence Administration's proposed rule to update the Title X program includes a number of significant changes that run counter to Congress's intent in establishing the program and, like so many other harmful steps this Administration is taking, will make it significantly harder for women across the country to get the health care they need. The proposed rule would allow politicians with extreme ideological views to interfere with women's personal health care decisions, undermine the provider-patient relationship, and leave women's access to health care increasingly dependent on how much money they have and where they live. The proposed rule would have devastating impacts on women across our country and we urge you to reverse course and revoke it.

**I. Congress intended for the Title X program to create a comprehensive and integrated system for family planning services.**

On a bipartisan basis, Congress established the Title X family planning program to address the unmet need for family planning services and to make this specialized care available to all, regardless of their income. Before Title X was enacted in 1970, 60 percent of counties lacked a family planning program.<sup>1</sup> In the process of establishing the nation's family planning program, Congress engaged in extensive committee hearings and floor debates that document its intent that the program be comprehensive and integrated.<sup>2</sup>

In addition, in arguing for the creation of a nationwide family planning program, President Richard Nixon stated, "it is clear that the domestic family planning services supported by the Federal Government should be expanded and better integrated."<sup>3</sup> He further called for "more extensive[]" reliance on the "existing network" of providers already participating in a small federal program under the Office of Economic Opportunity.

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<sup>1</sup> *Family Planning Services in the U.S.: A National Overview, 1968*, Family Planning Perspectives, Vol 1, No. 2 (Oct. 1969).

<sup>2</sup> 116 Congressional Record, 91 Congress, 2 session, 1970; 91 S. 2108; 91 H.R. 19318; "Family Planning Services" Hearing HRG-1970-FCH-0043; "Family Planning and Population Research, 1970" Hearing HRG-1969-LPW-0014; [https://congressional.proquest.com/congressional/docview/t33.d34.91\\_pl\\_572?accountid=45340](https://congressional.proquest.com/congressional/docview/t33.d34.91_pl_572?accountid=45340).

<sup>3</sup> President Richard Nixon, "Special Message to the Congress on Problems of Population Growth," July 18, 1969.

Congress emphasized its interest in comprehensive and coordinated approaches to family planning, including making effective contraception available to all women and especially low-income women, throughout the legislative debate around the Title X bill. Senate report language from 1970 stated, “[T]his legislation is designed to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons in the United States desiring such services; to provide greatly increased support for biomedical, behavioral, and operational research relevant to family planning and population; to develop and disseminate information on population growth; and to coordinate and centralize the administration of family planning and population research programs conducted by the Department of Health, Education, and Welfare.”<sup>4</sup> The Senate Committee on Labor and Public Welfare’s Subcommittee on Health described its efforts to organize “a comprehensive and coordinated attack on the ... family planning problem” and worked to bring about a “coordinated, concerted federal focus on this problem.”<sup>5</sup> Senator Thomas Eagleton (D-MO) endorsed as “indispensably vital to this hearing” a Louisiana physician’s testimony in favor of a “coherent, adequately-funded, well-coordinated national family-planning-service delivery system.”<sup>6</sup>

It is clear that Congress intended for the Title X program to focus on addressing the nation’s family planning needs and that efforts now to apply ideological restrictions to the program that will limit qualified providers from participating run counter to Congress’s intent.

**II. By imposing restrictions on providers, the proposed rule would have a devastating impact on the provider network and on the ability of women to access health care from a trusted provider of their choice.**

*Physical Separation Requirements*

The proposed rule’s numerous requirements for physical and administrative separation would make it more difficult for women to access the family planning services they need and would undermine Title X’s role as a broad family planning program. Title X-funded clinics provide services to 4 million low-income patients each year, including women who traditionally face health disparities, such as women living in rural communities<sup>7</sup> and women of color who make up 51 percent of the Title X recipients. Of all Title X patients, 32 percent are Hispanic women or Latina, 21 percent are black women, and 4 percent are Asian American or Pacific Islander women.<sup>8</sup>

The proposed rule would jeopardize these patients’ access to health care by making it harder for health centers to operate. The proposed rule mandates that Title X-funded health centers be

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<sup>4</sup> “Expanding, Improving, and Better Coordinating the Family Planning services and Population Research Activities of the Federal Government,” Senate Committee on Labor and Public Welfare, July 7, 1970.

<sup>5</sup> “Family Planning and Population Research, 1970,” Senate Committee on Labor and Public Welfare, Senate Subcommittee on Health, December 8, 1969.

<sup>6</sup> *Id.*

<sup>7</sup> National Family Planning and Reproductive Health Association. Title X: Helping Ensure Access to High-Quality Care. (March 2015) at <https://www.nationalfamilyplanning.org/document.doc?id=514>.

<sup>8</sup> HHS Office of Population Affairs, Family Planning Annual Report: 2016 National Summary (Aug. 2017), 12 at <https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf>.

physically and financially separate from programs that provide, refer for, or even “present” abortion as an option. While Title X-funded health programs have long complied with strict financial segregation requirements, the proposed rule would offer broad latitude to HHS to disqualify providers based on an onerous list of physical and administrative standards that have no grounding in a provider’s actual ability to provide needed care and could prove impossible for some centers to comply with.

Besides requiring separate accounting records, the proposed rule directs HHS to assess program grant applicants for separate office entrances; separate treatment, consultation, examination, and waiting rooms; separate personnel and personnel workstations; and separate medical records systems among numerous other criteria that would impose massive expense and redundancy on health care providers. The economic analysis of this proposed rule suggests that it would cost between \$10,000 and \$30,000 in order to comply with these requirements. This cost does not reflect what would be expected to create separate facilities, which would be required to comply with the separation requirements. It is very likely that these costs would cause clinics to close or reduce services, resulting in reduced access to health care.

The separation requirements would undermine what Congress intended for the Title X program, by essentially eliminating the ability for qualified providers to participate in the Title X network.

#### *Prohibited Activities*

The proposed regulation also includes a broad prohibition on more than a dozen activities related to abortion that are certain to create confusion among providers and patients and will limit the accessibility of health care services. The list includes such actions as creating a “favorable attitude” toward abortion, an undefined term that could severely limit the providers or health centers to which a patient could be referred. The lack of clarity within the proposed regulation may also lead qualified providers to avoid permissible or medically advisable activities for fear of being found in violation of the law.

Expert providers of family planning are concerned about how they will comply with these overly broad restrictions.<sup>9</sup> Consequently, health centers may be forced to forego funding rather than risk incidentally running afoul of the standards. This onerous design seems to reveal the true purpose of the new regulatory scheme: to discourage specialized reproductive health centers from participating in the program at all.

By discriminating against clinics unless they agree to unacceptable intrusions on the patient-provider relationship, the proposed rule could force health centers to stop participating in the Title X program or to shut down entirely, both of which would severely limit access to reproductive health care.

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<sup>9</sup> Letter to Sec. Azar (May 2018) <https://www.nationalfamilyplanning.org/document.doc?id=3728>.

**III. By gagging providers from providing full, confidential, unbiased information about their patients' health care options, the proposed rule would further undermine the patient-provider relationship.**

The proposed rule would deny funding to health centers unless they agree to restrict the services and advice their clinicians can offer to patients.

*Unbiased counseling*

Patients rely on their health care providers for sound advice and comprehensive, unbiased information about their health care options. The American Medical Association's Code of Medical Ethics advises that "[t]ruthful and open communication between physician and patient is essential for trust in the relationship and for respect for autonomy."<sup>10</sup> Yet, the proposed rule restricts a provider's ability to counsel her patients based on her clinical judgment and consistent with her professional obligations and training. By blocking health care practitioners from honestly answering patients' questions or providing comprehensive information, these restrictions interfere with this relationship of trust.

By removing the requirement for nondirective options counseling and prohibiting providers from referring patients for abortion care, the proposed rule would make it harder for patients to get the information they need to make the best decisions for themselves and their families and violates longstanding appropriations law that requires all pregnancy counseling to be nondirective.<sup>11</sup> Further, the regulations purport to permit limited abortion referral by allowing doctors to provide their patients a list of providers, some of whom may offer abortion care, but the list could not explicitly identify which services are provided by the health care providers on the list. Such restrictions on information sharing interfere with providers' ability to discuss health care options with their patients. In addition, the regulation seems to exclude nurses, physician's assistants, certified nurse midwives, trained counselors, or any other health professionals from sharing even that type of limited list. Because most Title X centers are staffed by a variety of types of health care providers, few Title X providers would be able to engage in even this limited opportunity for assisting patients who request referrals for abortions.<sup>12</sup>

*Confidentiality*

The strong confidentiality protections in the current Title X regulations and in the underlying statute are vital to ensuring that adolescents and young adults seek the health care they need. The proposed rule would *require* rather than *encourage* family involvement unless providers can meet a strict documentation requirement, which may not be appropriate for all patients and would undermine the provider-patient relationship, and could cause adolescents to avoid seeking health care at all.<sup>13</sup>

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<sup>10</sup> "Withholding Information from Patients: Code of Medical Ethics Opinion 2.1.3," American Medical Association. <https://www.ama-assn.org/delivering-care/withholding-information-patients>.

<sup>11</sup> Consolidated Appropriations Act, 2018, Pub. L. 115-141, Div. H, Title II, 132 Stat. 348, (2018).

<sup>12</sup> Christina Fowler, et al, *Title X Family Planning Annual Report: 2016 National Summary*, RTI International (August 2017). <https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf>.

<sup>13</sup> Abigail English, Carol A. Ford, *The HIPPA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, Perspectives on Sexual And Reproductive Health, Vol. 36, Issue 2, (March/April 2004)

**IV. The proposed rule would undermine the standard of care and change the focus of the program, by removing the requirement that providers offer a broad range of contraceptive methods and instead requiring them to prioritize primary care services.**

The proposed rule would eliminate the longstanding requirement that Title X programs provide “medically approved” family planning methods, potentially allowing purveyors of untested, unproven family planning methods to be eligible for program funds.<sup>14</sup> The proposed rule would also weaken language in current law ensuring that local Title X projects offer access to a broad range of family planning methods. In combination, these provisions could permit a non-medical crisis pregnancy center, which promotes a decidedly anti-contraception agenda and employs no trained health care providers, to nonetheless qualify for Title X funds. These proposed changes would likely reduce low-income patients’ options for health care and jeopardize their access to effective forms of contraception, including long-acting reversible contraception, like the intrauterine device (IUD) and implant.

The proposed rule attempts to morph the program’s focus away from dedicated family planning services towards primary care. It requires that providers prioritize comprehensive primary health care either by providing such services onsite or by having robust referral linkages with primary care providers.

While primary care is an important area of health services, disqualifying family planning specialists unless they emphasize primary care moves the program away from its purpose: to meet the unmet need for family planning services. In 2015, nearly three-quarters of Title X-funded sites reported being focused on providing reproductive health services.<sup>15</sup> Under the proposed rule, patients who currently obtain care from standalone family planning clinics would be at higher risk of discontinued contraceptive use and unintended pregnancy. Evidence from Texas has shown that replacing a family planning program with a program that eliminated specialized family planning clinics from participating and instead relied on primary-care “was associated with adverse changes in the provision of contraception.”<sup>16</sup> Among women who relied on injectable contraceptives, the rate of contraceptive continuation decreased, and the rate of childbirth covered by Medicaid increased following the State’s move away from committed family planning networks.<sup>17</sup>

Additionally, by redefining the “low-income families” to whom the Title X program provides free or reduced-cost services, to include families whose employers choose not to cover

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<https://www.guttmacher.org/journals/psrh/2004/hipaa-privacy-rule-and-adolescents-legal-questions-and-clinical-challenges>.

<sup>14</sup> “Compliance With Title X Requirements by Project Recipients in Selecting Sub recipients,” 36 Federal Register 179 (September 15, 1971).

<sup>15</sup> Mia Zolna, Jennifer J. Frost, *Publicly Funded Family Planning Clinics in 2015: Patterns and Trends in Service Delivery Practices and Protocols*, Guttmacher Institute (November 2016)

<https://www.guttmacher.org/report/publicly-funded-family-planning-clinic-survey-2015>.

<sup>16</sup> Amanda J. Stevenson, et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, *New England Journal of Medicine*, Vol. 374 (March 3, 2016)

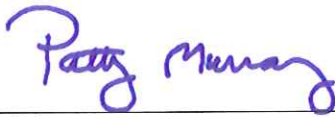
<https://www.nejm.org/doi/full/10.1056/nejmsa1511902>.

<sup>17</sup> *Id.*

contraceptive services for women, the proposed rule would include an entirely new population in the Title X program. Categorizing people as “low-income” based on their employer’s decision to not cover contraception – rather than on their actual income – would undermine the program’s original purpose to serve underserved populations. The proposed rule also does not contemplate the additional costs of providing free or reduced-cost contraception to women who would only qualify because of a decision by their employer.

The Department of Health and Human Services has not demonstrated a need for this rule. Rather than seeking to ensure that qualified providers are able to offer the reproductive health care and family planning services that are needed in this country, the proposed rule prioritizes ideology and ignores the goals and intent of Congress in establishing a nationwide family planning program. We urge you to rescind the proposed rule and to instead focus on efforts to enhance the quality of and access to reproductive health care for women throughout the nation.

Sincerely,



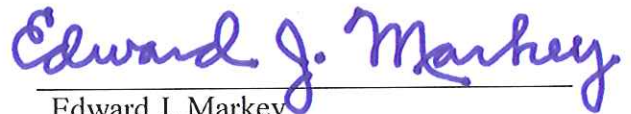
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United States Senator



Sherrod Brown  
United States Senator



Sheldon Whitehouse  
United States Senator



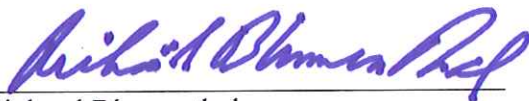
Edward J. Markey  
United States Senator



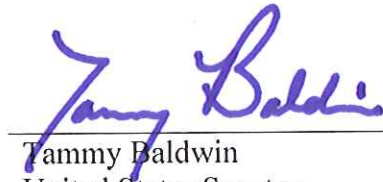
Elizabeth Warren  
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Kamala D. Harris  
United States Senator




Richard Blumenthal  
United States Senator




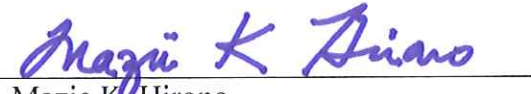
Tammy Baldwin  
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Jeanne Shaheen  
United States Senator


  
Margaret Wood Hassan  
United States Senator


  
Patrick Leahy  
United States Senator

  
Jon Tester  
United States Senator

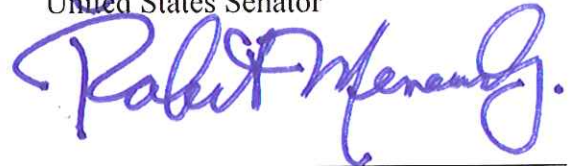
  
Mazie Hirono  
United States Senator

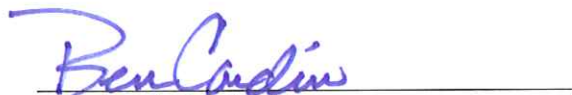
  
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United States Senator

  
Tammy Duckworth  
United States Senator

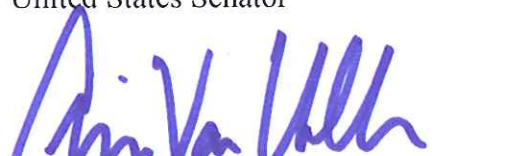
  
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United States Senator

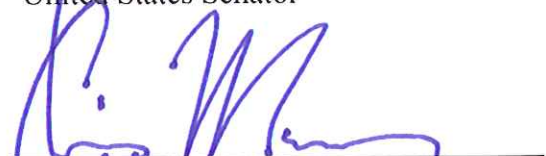
  
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United States Senator

  
Robert Menendez  
United States Senator

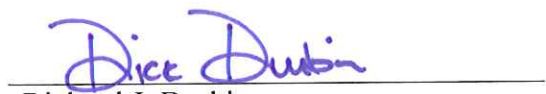
  
Benjamin L. Cardin  
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Debbie Stabenow  
United States Senator

  
Chris Van Hollen  
United States Senator

  
Christopher Murphy  
United States Senator

  
Michael F. Bennet  
United States Senator

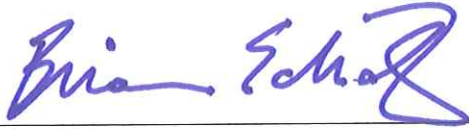
  
Richard J. Durbin  
United States Senator



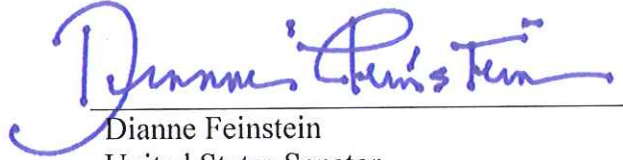
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United States Senator



Bernard Sanders  
United States Senator



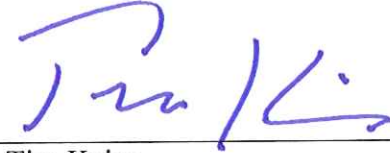
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United States Senator



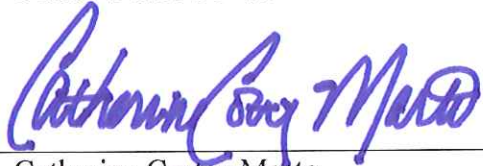
Dianne Feinstein  
United States Senator



Maria Cantwell  
United States Senator



Tim Kaine  
United States Senator



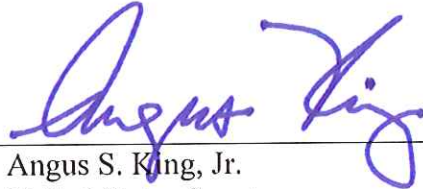
Catherine Cortez Masto  
United States Senator



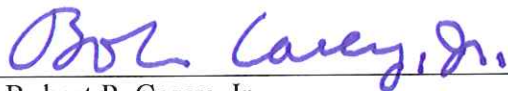
Bill Nelson  
United States Senator



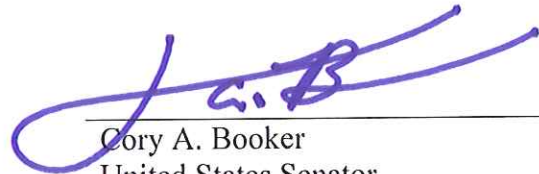
Amy Klobuchar  
United States Senator



Angus S. King, Jr.  
United States Senator



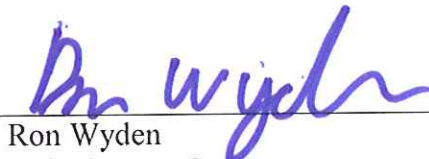
Robert P. Casey, Jr.  
United States Senator



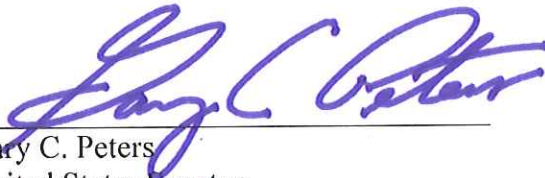
Cory A. Booker  
United States Senator



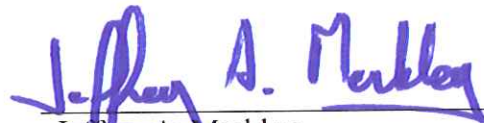
Charles E. Schumer  
United States Senator



Ron Wyden  
United States Senator

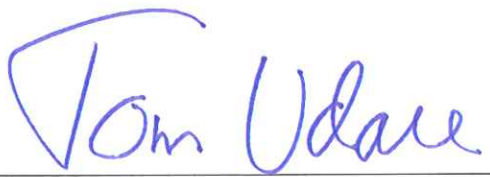


Gary C. Peters  
United States Senator



Jeffrey A. Merkley  
United States Senator





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Tom Udall  
United States Senator



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Tina Smith  
United States Senator



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Claire McCaskill  
United States Senator



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Martin Heinrich  
United States Senator



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Mark R. Warner  
United States Senator