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**Submitted via [www.regulations.gov](http://www.regulations.gov)**

July 31, 2018

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

**SUBJECT:** Comments on Proposed Rule RIN 0937-ZA00: “Compliance with Statutory Program Integrity Requirements”

Dear Secretary Azar:

As California’s Insurance Commissioner, I lead the largest consumer protection agency in the state and am responsible for regulating California’s insurance market, which is the nation’s largest. The California Department of Insurance implements and enforces consumer protections such as basic health coverage requirements, anti-discrimination protections, and laws pertaining to access to reproductive health care.

The proposed rule, *Compliance with Statutory Program Integrity Requirements*, is an outright attack on women’s health care rights. It will result in the loss of health care for women that will reach far beyond access to abortion services, by preventing access to many other medically necessary basic health services. The Trump Administration’s proposed rule is an egregious interference with the provision of necessary health care to women served by the Title X program, and will result in undiagnosed cancers, untreated diseases, and restricted care choices. These proposed regulations make it more difficult for women to access family planning and other basic health services and undermines the standard of medical care for those women who manage to obtain care.

Existing federal law already prohibits using Title X funds to provide abortion. The new Trump rule proposes to go far beyond this limitation by censoring medical providers. It will force health care clinics, including Planned Parenthood clinics and Community Health Centers, to choose between providing adequate, medically necessary care to their patients and accepting the federal funds that enable them to provide a wide range of essential health care services to underserved communities. I strongly object to the proposed rule *Compliance with Statutory Program Integrity Requirements* (proposed rule) and urge that it be withdrawn by your Department.

### **Title X in California**

The National Family Planning Program, created in 1970 and authorized under Title X of the Public Health Service Act (Title X), is the only federal funding program created solely to provide family planning projects which “offer a broad range of acceptable and effective family planning methods and services...”<sup>1</sup> Title X funded clinics play a critical role in ensuring access to a broad range of health services for millions of low-income or uninsured individuals and others including contraceptive education and counseling; breast and cervical cancer screening; sexually transmitted disease (STD) testing, treatment, and counseling; and human immunodeficiency virus (HIV) testing, referral and prevention education; and pregnancy testing and counseling.<sup>2</sup> The services provided under a Title X grant may be provided to anyone who wants them, with priority given to individuals from low-income families.<sup>3</sup> Title X grantees may re-grant funds to health care providers and other organizations to deliver family planning and preventive services, connect individuals to health care, and provide information they need to support their reproductive healthcare goals and optimal health outcomes.<sup>4</sup> Title X already explicitly prohibits the use of “funds appropriated under [Title X to] be used in programs where abortion is a method of family planning.”<sup>5</sup>

According to the United States Department of Health and Human Services, Office of Population Affairs (OPA), Title X funds are used to support the delivery of family planning and related services to more than 1,000,000 low-income uninsured or underinsured Californians annually at over 350 health centers throughout California.<sup>6</sup> Californians made up approximately 26% of Title X service recipients nationwide in 2016. Of these Californians, 91% had income under 250% of the poverty level which qualified them for subsidized or free services.<sup>7</sup>

### **Impacts of the Proposed Rule**

This proposed rule represents yet another attack on women’s reproductive health by the Trump Administration and, specifically, on the Californians who account for one quarter of all Title X service recipients. The proposed rule is a thinly veiled attempt to defund Planned Parenthood, which provides a wide range of reproductive health care services to low-income, uninsured, and underinsured women in the United States.

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<sup>1</sup> 42 U.S.C. § 300(a).

<sup>2</sup> *Title X Family Planning Annual Report, 2016 National Summary*, U.S. Dept. of Health & Human Services, Office of Population Affairs, August 2017, at 1.

<sup>3</sup> 42 U.S.C. § 300a-4(c); *Title X Family Planning Annual Report, 2016 National Summary*, U.S. Dept. of Health & Human Services, Office of Population Affairs, August 2017, at 1.

<sup>4</sup> Essential Access Health website: <https://www.essentialaccess.org/programs-and-services/about-title-x>

<sup>5</sup> 42 U.S.C. § 300a-6.

<sup>6</sup> *Title X Family Planning Annual Report, 2016 National Summary*, U.S. Dept. of Health & Human Services, Office of Population Affairs, August 2017, at Exhibit B-1.

<sup>7</sup> *Id.* at Exhibit B-2.

The preamble to the proposed rule falsely claims that “the new regulations would contribute to more clients being served, gaps in service being closed, and improved client care that better focuses on the family planning of the Title X program.”<sup>8</sup> This conflicts with the statement on OPA’s website that “access to quality family planning and reproductive health services [as] integral to overall good health for both men and women.”<sup>9</sup> The proposed rule will have the opposite effect: women and men will lose vital health care services and access to important health clinics, including community health centers. Providers will lose funding and possibly have to shut their doors, resulting in a long term, lasting adverse impact on the delivery of quality health care services to those who need it most.<sup>10</sup>

***The Proposed Rule Endangers Women’s Lives By Creating Barriers To Abortion Beyond the Authority Granted Under Title X.***

The proposed rule proposes to amend Section 59.5(a)(5) to prohibit a provider from promoting, referring, supporting, or presenting abortion as a method of family planning and adds Section 59.13 through 59.19 to make specific these prohibitions. The existing rule already prohibits a provider from being reimbursed for providing abortion services. This proposed rule moves far past this and attempts to limit the ability of a woman to seek information on abortion services from any provider that receives Title X funding to provide reproductive health care services.

Despite the Department’s claim that the proposed rule does not amount to a “gag rule”, the rule, as proposed, will censor the ability of a medical professional to provide comprehensive counseling to patients. If your Department truly believes this proposed rule does not amount to a gag rule prohibiting medical professionals from providing comprehensive reproductive health counseling, the proposed rule should be revised to clarify that counseling of all reproductive healthcare options is allowed. If a woman tells her doctor that she wishes to seek an abortion, but that provider is required by your regulations to give her a list of providers that includes those who don’t provide abortion services, at best that will delay the ability of the patient to obtain the medical care she is seeking. Requiring a Title X participant to provide a list of health service providers “some, but not all, of which also provide abortion” and prohibiting any notation as to those who provide abortion services plays deceptive game with the healthcare rights of women.

Requiring that all pregnant women be referred to prenatal care, regardless of their stated wishes, amounts to professional censorship, forcing providers to violate their professional obligations to their patients, and is an additional, unnecessary intrusion into a woman’s right to privacy and the

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<sup>8</sup> 83 FR 25505.

<sup>9</sup> U.S. Health and Human Services, Office of Population Affairs website:  
<https://www.hhs.gov/opa/guidelines/program-guidelines/index.html>

<sup>10</sup> Rosenbaum, S, et al., *The Title X Family Planning Proposed Rule: What’s At State For Community Health Centers?* Health Affairs Blog (June 25, 2018), Available at:  
<https://www.healthaffairs.org/doi/10.1377/hblog20180621.675764/full/>

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right to make her own health care choices. An explicit requirement of the Title X program and the proposed rule is that the services provided are voluntary and non-coercive.<sup>11</sup> Requiring a Title X participant to refer a pregnant woman to prenatal services, despite her stated intent to terminate the pregnancy is coercive and delays the provision of the medical care she seeks, which harms the patient's health.

As your Department points out, the 1988 regulation on which the current proposed rule is based was suspended on February 5, 1993. The 1988 Regulation was suspended in order to eliminate the provisions that prohibited Title X providers from counseling or referring project clients for abortion. In suspending the provisions, the President issued the following statement:

Title X of the Public Health Services Act [this subchapter] provides Federal funding for family planning clinics to provide services for low-income patients. The Act specifies that Title X funds may not be used for the performance of abortions, but places no restrictions on the ability of clinics that receive Title X funds to provide abortion counseling and referrals or to perform abortions using non-Title X funds. During the first 18 years of the program, medical professionals at Title X clinics provided complete, uncensored information, including nondirective abortion counseling. In February 1988, the Department of Health and Human Services adopted regulations, which have become known as the "Gag Rule," prohibiting Title X recipients from providing their patients with information, counseling or referrals concerning abortion. Subsequent attempts by the Bush Administration to modify the Gag Rule and ensuing litigation have created confusion and uncertainty about the current legal status of the regulations.

The Gag Rule endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients. Furthermore, the Gag Rule contravenes the clear intent of a majority of the members of both the United States Senate and House of Representatives, which twice passed legislation to block the Gag Rule's enforcement but failed to override Presidential vetoes.<sup>12</sup>

This statement is just as true today as it was 25 years ago. Women's health needs must not be traded on to gain political points. This proposed rule censors physicians and other medical providers by interjecting the Department's anti-choice dogma above the expertise and duty of the trained medical professional providing health care to individual patients. Additionally, this censorship limits the ability of the patient to receive the full extent of the medical professional's

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<sup>11</sup> 42 U.S.C. § 300a-5; 83 FR 25529 {Proposed Rule § 59.2}.

<sup>12</sup> The Title X "Gag Rule", 58 FR 7455 (January 22, 1993).

knowledge and, potentially, could result in adverse health consequences. The Department's claim that this proposed rule enhances the quality of care patients will receive is patently absurd.

### *Wall of Separation*

The rule proposes to “draw a wall of separation between Title X programs and prohibited activities” including referrals for abortion and where Title X programs might share a building, costs, other infrastructure or otherwise operate in a way that the proposed rule would view as subsidizing other programs where abortion is a method of family planning.<sup>13</sup> This proposed rule would require physical and financial separation between organizations that receive Title X funding and those at which abortions services are provided or presented.<sup>14</sup> Planned Parenthood and other woman's health centers have reported that this additional requirement could cost them millions of dollars each year.<sup>15</sup> As a result, fewer women will be able to access reproductive health care services.

Although this proposed rule is an overt attempt by the Trump Administration to defund Planned Parenthood, it will also impact other community health centers, hospitals, health districts, and city and state health departments, as well as school-based, faith-based, and other nonprofit organizations.<sup>16</sup> Many family planning clinics are committed to offering comprehensive services, including contraception and abortion referrals. The “wall of separation” proposed in this rule results in these health centers having to choose between vital Title X funding and providing comprehensive health care services.<sup>17</sup> A reduction in funds would result in less money available to these clinics for STD and cancer screening, treatment, and outreach.<sup>18</sup> This will have an outsized impact on young people ages 15 through 24 who account for half of all new STD cases.<sup>19</sup> And by making it more difficult for women to access health education and contraceptives, this proposed rule will also result in a greater number of unintended pregnancies and an increased need for abortion services.

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<sup>13</sup> 42 CFR § 59.15 {proposed}.

<sup>14</sup> 83 FR 25519.

<sup>15</sup> Hsu, Spencer, *Groups Suing Trump Administration Over Family Planning Express Optimism*, June 22, 2018, Washington Post, Available here: <https://www.washingtonpost.com/news/to-your-health/wp/2018/06/22/groups-suing-trump-administration-over-family-planning-express-optimism>.

<sup>16</sup> Sobel, L. et al, *Proposed Changes to Title X: Implications for Women and Family Planning Providers*, (“KFF Report”) June 28, 2018, Kaiser Family Foundation, available here: <https://kaiserf.am/2tDgbc9>.

<sup>17</sup> Andrews, M., *The 'Perfect Storm': Redirecting Family Planning Funds Could Undercut STD Fight*, June 12, 2018, Kaiser Health News, Available Here: <https://khn.org/news/the-perfect-storm-redirecting-family-planning-funds-could-undercut-std-fight/>.

<sup>18</sup> Id.

<sup>19</sup> Id.; citing U.S. Centers for Disease Control and Prevention (CDC), *STDs in Adolescents and Young Girls, Public Health Impact*, 2016 Sexually Transmitted Diseases Surveillance, available here: <https://www.cdc.gov/std/stats16/adolescents.htm>

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Additionally, current and potential Title X project sites that do not offer abortion services may still decide not to participate because of concerns regarding the proposed rule's imposition of new clinical standards of care, medical liability, and burdensome administrative requirements.<sup>20</sup>

### ***Definition of "Family Planning"***

The proposed rule narrowly defines "family planning" to fit into the ultimate goals of the rule – to deny women access to comprehensive reproductive health care. The Department cites confusion created by limiting section 1008's (42 U.S.C. § 300a-6) prohibition to only "direct facilitation of abortion," but provides no evidence to substantiate this claim except an audit that occurred in 1982 of 32 Title X clinics.<sup>21</sup> In support of this significant shift in interpretation, the Department notes only a "risk of the intentional or unintentional use of Title X funds for impermissible purposes", but cites no actual violation of the use of Title X fund requirements in relation to the provision of abortion services.<sup>22</sup> Title X clinics already comply with the requirement that funds cannot be used to pay for abortion. Distorting the broader term "family planning" in order to prohibit even the mention of abortion as part of comprehensive care, will likely drive some health care clinics out of business – which appears to be among your goals.

### ***Definition of Low-Income Family***

#### Unemancipated Minors

In creating the Title X fund, Congress specifically included services for adolescents, with the intent to meet the reproductive needs of adolescents and to "prevent unwanted pregnancies among sexually active adolescents."<sup>23</sup> The proposed rule's revised definition of "low-income family" to require providers to document in an unemancipated minor's medical record the provider's attempts to encourage the minor to involve his/her family is an intrusive broadening of this proposed rule and may result in a reduction of needed services being sought by minors, counter to Congressional intent.<sup>24</sup> I urge you to remove this burdensome requirement. If you do not remove the requirement, I would urge you to revise the language, similar to the language used in the definition of "family planning," to note that while the provider is to "encourage" the unemancipated minor to involve his/her family, such encouragement should never be coercive and involvement of his/her family is strictly voluntary.

If you do not remove this expansion of the definition regarding unemancipated minors, I urge you to add the following to Section 59.11 of the proposed rule regarding confidentiality:

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<sup>20</sup> Sobel, L., KFF Report, *supra*.

<sup>21</sup> 83 FR 25503.

<sup>22</sup> 83 FR 25507.

<sup>23</sup> *Planned Parenthood v. Heckler*, 712 F.2d 650, 652 (D.C. Cir. 1983) (citing S. Rep. No. 822, 95th Cong. 2d Sess. 24 (1978)).

<sup>24</sup> 42 CFR § 59.2 {proposed}.

All information as to personal facts and circumstances obtained by the project staff about individuals receiving services, including unemancipated minors, must be held confidential and not disclosed without the individual's documented consent...

This amendment would be consistent with the laws of California and other states, which require documented consent for the release of medical records of a minor to a parent in specific situations, including a minor's request for contraceptives, HIV/AIDS testing and treatment, etc.<sup>25</sup> This would serve the purpose of encouraging unemancipated minors to seek the reproductive health services they need by ensuring they could do so without fear that a parent or guardian would inappropriately be notified of such treatments or requests for information.

Women Whose Employer Does Not Provide Contraceptive Coverage Due To Religious or Moral Objection

I support the Department's revised definition of "low-income family" as it applies to a woman who has health insurance coverage through an employer, which does not provide the contraceptive services sought by the woman because the employer has sincerely held religious or moral objection to providing such coverage.<sup>26</sup> As I noted in the comment letter I submitted to your Department on March 27, 2018 regarding the proposed "*Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*" rule a practical effect of that rule was reduced coverage of contraceptives for women. Although I continue to object to the *Conscience Rights* proposed rule as noted in my comment letter, I agree with the Department's change to this *Statutory Program Integrity* proposed rule to include women harmed by your proposed *Conscience Rights* rule, and those employed by employers who interfere with their access to contraceptive coverage.

***Removal of the Requirement that Title X Programs Provide "Medically Approved" Family Planning Methods***

Section 59.5 of the proposed rule proposes to remove the requirement that Title X programs provide "medically approved family planning methods and services" and replace it with "acceptable and effective" family planning methods and services, which aligns with language used in the statute. However, "acceptable and effective" are not defined in the proposed rule and may cause confusion as to what services may be provided, increasing the risk that services not contemplated by Title X could be paid for with this funding. I urge you to withdraw this change.

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<sup>25</sup> See Cal. Health & Safety Code § 123115(a)(1) (The representative of a minor shall not be entitled to inspect or obtain copies of the minor's patient records in ... [w]ith respect to which the minor has a right of inspection under [Health & Safety Code] Section 123110.)

<sup>26</sup> Id.

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The proposed rule also adds that “[s]uch projects are not required to provide every acceptable and effective planning method or service.” The addition of this sentence is unnecessary and likely to cause confusion. The very language of the existing and proposed rule (“a *broad range*” of services and methods) is sufficient to indicate that not every method or service must be provided. This sentence could be interpreted as allowing a program to unduly limit the methods or services provided, which would be in violation of the statutory requirement that “a broad range of acceptable and effective family planning methods” be provided.<sup>27</sup>

### ***Rights of LGBTQA+ Individuals***

Finally, I urge the Department to amend Section 59.5(a)(4) of the proposed rule to include the following:

Provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, gender, gender identity or expression, sexual orientation, or marital status.

### ***Conclusion***

Women will suffer serious and irreparable harm if this proposed rule is finalized. This rule interferes with a woman’s right to access a wide range of medically necessary health care services. It interferes with the relationship between medical providers and their patients, and puts medical providers in the untenable position of having to choose between providing comprehensive medical care to their patients or violating the proposed rule. Understandably, the proposed rule is opposed by a wide range of stakeholders. I strongly urge you to withdraw the proposed rule.

Sincerely,



DAVE JONES  
Insurance Commissioner

cc: Office of the Assistant Secretary for Health, Office of Population Affairs  
Attention: Family Planning

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<sup>27</sup> 42 USC § 300(a).