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Title X Family Planning: Proposed Rule on Statutory Compliance Requirements

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SUMMARY

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Title X Family Planning: Proposed Rule on Statutory Compliance Requirements

The Title X Family Planning Program (Title X), enacted in 1970, is the only domestic federal program devoted solely to family planning and related preventive health services. All 50 states, the District of Columbia, and the U.S. territories and Freely Associated States (collectively referred to as *states*) are eligible to apply for Title X grants, as are other public agencies and nonprofit organizations. Title X grants enable grantees to establish and operate *family planning projects*. A family planning project refers to a set of activities that a Title X grantee undertakes under its grant agreement to provide a broad range of family planning methods and services to Title X clients. (In 2016, Title X-funded clinics served 4 million clients.) Examples of Title X activities include provider-to-patient counseling, dissemination of educational materials, and the delivery of clinical services. Clinical services provided through Title X projects include contraceptive services and supplies, sexually transmitted disease testing and treatment, and preconception health care services. All services are confidential.

Title X is administered through the Office of Population Affairs (OPA) in the Department of Health and Human Services (HHS). The program was appropriated $286.5 million for FY2018. Federal law (42 U.S.C. §300a-6) prohibits the use of Title X funds in projects "where abortion is a method of family planning." According to OPA, family planning projects that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and that funds are not used for prohibited activities such as for performing surgical abortion procedures. Under current program guidance, the abortion prohibition does not apply to all Title X grantees' activities; instead, the prohibition applies only to activities that are part of the Title X project. A grantee's abortion activities must be "separate and distinct" from the Title X project activities.

On June 1, 2018, OPA published a proposed rule in the *Federal Register*, "Compliance with Statutory Program Integrity Requirements," that would make several changes to federal Title X family planning regulations, including the following:

- Title X projects would no longer be required to offer pregnant clients the opportunity to receive abortion information, counseling, and referral upon request.
- Title X projects would be prohibited from referring patients to abortion services.
- Title X projects would be required to maintain physical and financial separation between their Title X projects and abortion-related activities.
- Several terms, including "family planning" and "low-income family," would have new definitions.
- Criteria for awarding Title X Family Planning Services grants would be revised.
- Title X grant applicants and grantees would be subject to new reporting requirements.

This proposed rule has sparked a congressional debate about the scope of Title X. The 115th Congress is debating the scope of Title X to determine whether providing an abortion-related service, such as referring a pregnant client to an abortion provider, should be a family planning service under Title X. In addition, Members of Congress are debating whether this proposed rule is a "gag rule": an attempt to prevent some Title X clients from receiving adequate information that would permit them to make an informed decision about their health care treatment.

This report summarizes the proposed rule's major elements and explains how the proposed rule differs from current Title X rules and guidance. In addition, CRS provides HHS's rationale for the components of the proposed rule, as well as selected commentary from key stakeholders in reaction to the proposed rule.

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Introduction

The Title X Family Planning Program (Title X), enacted in 1970, is the only domestic federal program devoted solely to family planning and related preventive health services.[1] It is administered by the Office of Population Affairs (OPA), under the Office of the Assistant Secretary for Health (OASH) within the Department of Health and Human Services (HHS). On June 1, 2018, HHS published a proposed rule in the *Federal Register* that would change OPA's administration of the grant program. HHS contends that the program has not been properly administered in accordance with Sections 300 to 300a-6 of title 42 of the U.S. Code (U.S.C).[2] HHS states that the goal of the rule is to ensure that Title X funds are used within the limits set by Congress.[3]

According to HHS, family planning projects[4] that receive Title X funds are closely monitored to ensure that federal funds are used appropriately and are not used for prohibited activities, such as for performing surgical abortion procedures.[5] HHS states that the agency has concerns about whether Title X projects that operate in a health care facility where abortions are provided are unintentionally crossing federal funds with funds used to cover the facility's abortion-related expenses.[6] Furthermore, according to the proposed rule's preamble, OPA had previously misinterpreted current law by requiring Title X providers to provide abortion-related services such as counseling and referrals to their patients upon request.[7]

The 115th Congress is debating the scope of the program to determine whether providing an abortion-related service such as an abortion referral should be a family planning service under Title X. For example, some Members of Congress have stated that the service of providing abortion referrals is a family planning service that Title X providers should continue to provide Title X clients upon request.[8] According to some Members of Congress, the proposed rule is a

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[1] CRS Report R45181, *Family Planning Program Under Title X of the Public Health Service Act*.

[2] U.S. Department of Health and Human Services (HHS), Office of Population Affairs (OPA), "Compliance with Statutory Program Integrity Requirements," 83 *Federal Register* 25502-2533, at 25505, June 1, 2018, https://www.federalregister.gov/d/2018-11673. HHS had initially released the proposed rule on its website on May 22, 2018. The National Family Planning & Reproductive Health Association, a membership organization of family planning providers, has posted a table comparing current regulation text with the text of the proposed rule: https://www.nationalfamilyplanning.org/file/documents—policy—communication-tools/Title-X-Regulations—Comparison-of-Current-Regulations-and-2018-NPRM-5.30.18.pdf.

[3] 83 *Federal Register* 25502.

[4] Current program guidance defines a *project* as "[a]ctivities described in the grant application and any incorporated documents supported under the approved budget. The 'scope of the project' as defined in the funded application consists of activities that the total approved grant-related project budget supports." (HHS, OPA, *Program Requirements for Title X Funded Family Planning Projects*, p. 7, April 2014, https://www.hhs.gov/opa/sites/default/files/ogc-cleared-final-april.pdf). The proposed rule would have a new definition: "*Program* and *project* are used interchangeably and mean a plan or sequence of activities that fulfills the requirements elaborated in a Title X funding announcement and may be comprised of, and implemented by a single grantee or subrecipient(s), or a group of partnering providers who, under a grantee or subrecipient, deliver comprehensive family planning services that satisfy the requirements of the grant within a service area." (83 *Federal Register* 25530).

[5] Email from HHS, Office of the Assistant Secretary for Legislation, May 1, 2017.

[6] 83 *Federal Register* 25508-25509.

[7] 83 *Federal Register* 25506.

[8] S.Res. 526; Letter from Elizabeth Warren, U.S. Senator, Margaret Wood Hassan, U.S. Senator, and Patty Murray, U.S. Senator, et al. to Alex M. Azar II, Secretary of HHS, May 14, 2018, https://www.warren.senate.gov/imo/media/doc/2018.05.14%20Letter%20to%20HHS%20Opposing%20Domestic%20Gag%20on%20Title%20X.pdf; and Letter from Joseph Crowley, U.S. House Representative, Nita M. Lowey, U.S. House Representative, and Barbara Lee, U.S.

gag rule that "would bar patients from receiving information to support their ability to make informed decisions about their own reproductive health."[9] These Members of Congress are referring to a policy originally put in place by President Reagan in 1988 that was challenged in court but upheld by the Supreme Court in 1991.[10] The court case, *Rust v. Sullivan*, narrowed the scope of permissible abortion-related activities that are linked to federal funding.[11] Congress subsequently voted to repeal the gag rule but fell short of the two-thirds majority needed to override a President George H.W. Bush veto in 1992.[12] The Clinton Administration suspended the gag rule in January 1993.[13] According to the Clinton Administration,

> During the first 18 years of the [Title X] program, medical professionals at Title X clinics provided complete, uncensored information, including nondirective abortion counseling. In February 1988, [HHS] 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 [George H.W.] Bush Administration to modify the Gag Rule and ensuing litigation have created confusion and uncertainty about the current legal status of the regulations.[14]

Other Members of Congress state that Title X providers should not provide abortion referrals as a method of family planning.[15] According to these Members, current regulations on abortion

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House Representative, et al. to Alexander M. Azar II, Secretary of HHS, May 15, 2018, https://degette.house.gov/sites/degette.house.gov/files/FINAL%20House%20Title%20X%20Domestic%20Gag%20Letter%5B1%5D.pdf.

[9] Letter from Joseph Crowley, U.S. House Representative, Nita M. Lowey, U.S. House Representative, and Barbara Lee, U.S. House Representative, et al. to Alexander M. Azar II, Secretary of HHS, May 15, 2018, https://degette.house.gov/sites/degette.house.gov/files/FINAL%20House%20Title%20X%20Domestic%20Gag%20Letter%5B1%5D.pdf; Letter from Patty Murray, U.S. Senator, Sherrod Brown, U.S. Senator, Sheldon Whitehouse, U.S. Senator, et al., to The Honorable Alex Azar, Secretary of HHS, July 31, 2018, https://www.help.senate.gov/download/20180731-title-x-gag-rule-comment-letter_final; Letter from Elizabeth Warren, U.S. Senator, Margaret Wood Hassan, U.S. Senator, and Patty Murray, U.S. Senator, et al. to Alex M. Azar II, Secretary of HHS, May 14, 2018, https://www.warren.senate.gov/imo/media/doc/2018.05.14%20Letter%20to%20HHS%20Opposing%20Domestic%20Gag%20on%20Title%20X.pdf; and Letter from Joseph Crowley, U.S. House Representative, Nita M. Lowey, U.S. House Representativ H.Res. 915e, and Barbara Lee, U.S. House Representative, et al. to Alexander M. Azar II, Secretary of HHS, May 15, 2018, https://degette.house.gov/sites/degette.house.gov/files/FINAL%20House%20Title%20X%20Domestic%20Gag%20Letter%5B1%5D.pdf. See also S.Res. 526 and H.Res. 915.

[10] Guttmacher Institute, *Title X 'Gag Rule' is Formally Repealed*, August 1, 2000, https://www.guttmacher.org/gpr/2000/08/title-x-gag-rule-formally-repealed.

[11] CRS Report RL33467, *Abortion: Judicial History and Legislative Response*.

[12] S. 323, Family Planning Amendments Act of 1992.

[13] U.S. President (Clinton), "Memorandum on the Title X 'Gag Rule,' January 22, 1993," *Public Papers of the Presidents of the United States: William J. Clinton, 1993, Book 1*, p. 10, https://www.gpo.gov/fdsys/pkg/PPP-1993-book1/pdf/PPP-1993-book1-doc-pg10.pdf.

[14] Ibid.

[15] Letter from Roy Blunt, U.S. Senator, Joni K. Ernst, U.S. Senator, and James Lankford, U.S. Senator, et al. to The Honorable Alex Azar, Secretary of HHS, April 29, 2018, https://www.blunt.senate.gov/public/_cache/files/9c79cf68-9f8e-4b8a-a723-ad2c951dc849/title-x-reagan-rule-sign-on-letter-blunt-ernst-lankford-daines.pdf; Letter from Ron Estes, U.S. House Representative, Vicky Hartzler, U.S. House Representative, and Diane Black, U.S. House Representative, et al. to The Honorable Alex Azar, Secretary of HHS, April 30, 2018, https://black.house.gov/sites/black.house.gov/files/documents/Rep.%20Black%20Title%20X-%20Final%20Copy.pdf; Letter from Ron Estes, U.S. House Representative, Vicky Hartzler, U.S. House Representative, and Diane Black, U.S. House Representative, et al. to The Honorable Alex Azar, Secretary of HHS, July 10, 2018, https://estes.house.gov/uploadedfiles/estes-title-x-letter-2018-07-10.pdf; and James Lankford, U.S. Senator, Roy Blunt, U.S. Senator, and Joni K. Ernst, U.S. Senator, et al. to The Honorable Alex Azar, Secretary of HHS, July 25, 2018, https://www.wicker.senate.gov/public/_cache/files/07c516ac-ce41-4e8e-afd1-ded90249e788/signed-title-x-comment-letter.pdf.

referrals "undermine" the statutory requirement that no Title X funds shall be used in projects "where abortion is a method of family planning."[16] The Trump Administration has stated that "[c]ontrary to recent media reports, HHS's proposal does not include the so-called 'gag rule' on counseling about abortion that was part of the Reagan Administration's Title X rule."[17] Members on both sides of the issue agree, however, that the proposed rule would make it harder for Planned Parenthood Federation of America (PPFA) to receive Title X funds.[18]

To assist Congress as it considers issues related to Title X, this report

- provides a brief overview of the Title X program;
- discusses the proposed rule's major elements and explains how the proposed rule differs from current Title X rules and guidance;
- provides HHS' rationale for the components of the proposed rule, as well as selected commentary from key stakeholders in reaction to the proposed rule; and
- summarizes HHS's regulatory impact analysis.

The Title X Family Planning Program

All 50 states, the District of Columbia, and the U.S. territories and Freely Associated States (collectively referred to as *states*) are eligible to apply for Title X grants, as are other public agencies and nonprofit organizations. Grantees may use Title X dollars to establish and operate family planning projects that provide effective methods of family planning services, such as contraception, as well as infertility services.[19] In 2016, there were 91 Title X family planning

[16] Ibid.

[17] U.S. President (Trump), "Statement from the Press Secretary Regarding the Proposed Title X Family Planning Program Rule from [HHS]," May 18, 2018, pp. https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-proposed-title-x-family-planning-program-rule-department-health-human-services/.

[18] Letter from Elizabeth Warren, U.S. Senator, Margaret Wood Hassan, U.S. Senator, and Patty Murray, U.S. Senator, et al. to Alex M. Azar II, Secretary of HHS, May 14, 2018, https://www.warren.senate.gov/imo/media/doc/2018.05.14%20Letter%20to%20HHS%20Opposing%20Domestic%20Gag%20on%20Title%20X.pdf; Letter from Joseph Crowley, U.S. House Representative, Nita M. Lowey, U.S. House Representative, and Barbara Lee, U.S. House Representative, et al. to Alexander M. Azar II, Secretary of HHS, May 15, 2018, https://degette.house.gov/sites/degette.house.gov/files/FINAL%20House%20Title%20X%20Domestic%20Gag%20Letter%5B1%5D.pdf; Senator Patty Murray, "Senator Murray Releases New Report Detailing Harm to Washington State Under Trump-Pence Proposed Restrictions to Family Planning Funds," press release, May 24, 2018, https://www.murray.senate.gov/public/index.cfm/2018/5/senator-murray-releases-new-report-detailing-harm-to-washington-state-under-trump-pence-proposed-restrictions-to-family-planning-funds; Representative Tim Ryan, "Congressman Tim Ryan Condemns Trump Administration's Decision to Implement Gag Rule," press release, May 24, 2018, https://timryan.house.gov/media/press-releases/congressman-tim-ryan-condemns-trump-administration-s-decision-implement-gag; Letter from Roy Blunt, U.S. Senator, Joni K. Ernst, U.S. Senator, and James Lankford, U.S. Senator, et al. to The Honorable Alex Azar, Secretary of HHS, April 29, 2018, https://www.blunt.senate.gov/public/_cache/files/9c79cf68-9f8e-4b8a-a723-ad2c951dc849/title-x-reagan-rule-sign-on-letter-blunt-ernst-lankford-daines.pdf; and Letter from Ron Estes, U.S. House Representative, Vicky Hartzler, U.S. House Representative, and Diane Black, U.S. House Representative, et al. to The Honorable Alex Azar, Secretary of HHS, April 30, 2018, https://black.house.gov/sites/black.house.gov/files/documents/Rep.%20Black%20Title%20X-%20Final%20Copy.pdf; and Susan B. Anthony List, *Support for the Trump Administration's Protect Life Rule*, May 23, 2018, https://www.sba-list.org/newsroom/latest-news/support-for-the-trump-administrations-protect-life-rule.

[19] 42 U.S.C. §300(a); Christina Fowler, Julia Gable, Jiantong Wang, and Beth Lasater, *Family Planning Annual Report: 2016 National Summary*, RTI International, Research Triangle Park, NC, August 2017, p. 7, https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf. Directories of Title X grantees, subrecipients, and clinic sites are at https://www.hhs.gov/opa/title-x-family-planning/title-x-grantees/index.html and https://www.opa-fpclinicdb.com. For a map with the number of Title X-funded clinics by county in 2015, see Frost et al., *Publicly*

services grantees.[20] These grantees included 48 state, local, and territorial health departments and 43 nonprofit organizations, such as community health agencies, family planning councils, and Planned Parenthood affiliates.[21]

Grants for family planning services fund a range of family planning and related preventive health services, such as

- contraceptive services;
- natural family planning methods;
- infertility services;
- adolescent services;
- breast and cervical cancer screening and prevention;
- sexually transmitted disease (STD) and human immunodeficiency virus (HIV) prevention education, counseling, testing, and referral;
- preconception health services; and
- reproductive life plan counseling.[22]

These services must be provided "without coercion and with respect for the privacy, dignity, social, and religious beliefs of the individuals being served."[23] In FY2017, OPA used approximately 90% of Title X funds for clinical services such as those listed above, and the other 10% for activities such as personnel training and service delivery improvement research in family planning.[24]

Current regulations require that Title X's medical services be provided under the direction of a physician with special training or experience in family planning.[25] However, most Title X clinical service staff are not medical doctors. Title X clinical service providers include physicians, nurse practitioners, certified nurse midwives, physician assistants, and registered nurses.[26] In 2016, of Title X's full-time equivalent (FTE) clinical service providers, 22% were physicians; 71% were

Funded Contraceptive Services at U.S. Clinics, 2015, https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015. Click "Go to state and county maps," then choose "# of Title X-funded clinics" from the pull-down menu.

[20] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, p. 7. A directory of Title X grantees is at HHS, OPA, *Title X Grantees*, https://www.hhs.gov/opa/title-x-family-planning/title-x-grantees/index.html.

[21] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, p. 7. On August 2, 2018, HHS announced its intended FY2018 grantees: HHS, "HHS announces grantees for Title X family planning program services," press release, August 2, 2018, https://www.hhs.gov/about/news/2018/08/02/hhs-announces-grantees-for-title-x-family-planning-program-services.html.

[22] Title X clinical guidelines are laid out in Loretta Gavin, Susan Moskosky, Marion Carter, et al., "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs," *Morbidity and Mortality Weekly Report*, vol. 63, no. RR-4 (April 25, 2014), pp. 1-29, http://www.cdc.gov/mmwr/preview/mmwrhtml/rr6304a1.htm. To review updates to the Title X clinical guidelines, see HHS, OPA, *Quality Family Planning*, https://www.hhs.gov/opa/guidelines/clinical-guidelines/quality-family-planning/index.html.

[23] General Services Administration, *Assistance Listings*, "Family Planning Services; CFDA number 93.217" https://beta.sam.gov/fal/44fc3928b1aeea872df90344684896fb/view. See also 42 C.F.R. §59.5.

[24] U.S. Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA), *Fiscal Year 2018 Justification of Estimates for Appropriations Committees*, p. 289, https://www.hrsa.gov/sites/default/files/hrsa/about/budget/budget-justification-2018.pdf.

[25] 42 C.F.R. 59.5(b)(6). The proposed rule would continue this requirement.

[26] HHS, *Family Planning Annual Report: 2016 National Summary*, August 2017, p. 4, https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf#page=18.

nurse practitioners, certified nurse midwives, and physician assistants; and 7% were registered nurses with an expanded scope of practice.[27]

Title X grantees can provide family planning services directly or subaward Title X monies to other public or nonprofit entities to provide services. Although no fixed matching amount is required for grants, current regulations specify that no Title X projects may be fully supported by Title X funds.[28] In 2016, Title X grantees provided services through 3,898 clinics.[29] That same year, Title X-funded clinics served 4.008 million clients, primarily low-income women and adolescents.[30] Of those clients, 11% were male, 64% had incomes at or below the federal poverty guidelines, and 85% had incomes at or below 200% of the federal poverty guidelines.[31] An earlier survey found that for 61% of clients, Title X-funded clinics were their "usual" or only regular source of health care.[32] Forty-three percent of Title X clients were uninsured in 2016.[33]

Title X is a discretionary program (i.e., its funding is provided in and controlled by annual appropriations acts). It has received appropriations every year since the program started in FY1971. On March 23, 2018, President Trump signed the Consolidated Appropriations Act, 2018 (P.L. 115-141). This law provides $286.479 million for Title X in FY2018, the same as the FY2017-enacted level.[34] The FY2018 act continues previous years' requirements that Title X funds not be spent on abortions, among other requirements.[35]

President Trump's FY2019 budget request, submitted February 12, 2018, includes $286.479 million for Title X, the same as the FY2018-enacted level.[36] The FY2019 budget would continue previous years' provisions in appropriations laws prohibiting the use of Title X funds for abortion, among other requirements. On June 28, 2018, the Senate Appropriations Committee reported S.

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[27] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, p. ES-3.

[28] 42 C.F.R. §59.7(c). This requirement would be removed by the proposed rule. 83 *Federal Register* 25530-25531. In 2016, Title X funds accounted for 19% of Title X projects' revenues; other revenue sources included Medicaid and CHIP, state governments, private third-party payers, local governments, and client service fees. Christina Fowler, Julia Gable, Jiantong Wang, and Beth Lasater, *Family Planning Annual Report: 2016 National Summary*, RTI International, Research Triangle Park, NC, August 2017, p. 53, https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf.

[29] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, p. 7. Directories of Title X grantees, subawardees, and clinic sites are at https://www.hhs.gov/opa/title-x-family-planning/title-x-grantees/index.html and https://www.opa-fpclinicdb.com. For a map with the number of Title X-funded clinics by county in 2015, see Frost et al., *Publicly Funded Contraceptive Services at U.S. Clinics, 2015*, https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015. Click "Go to state and county maps," then choose "# of Title X-funded clinics" from the pull-down menu.

[30] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, p. 8. To view a map, by county, of the number of female Title X contraceptive clients served in 2015, see Jennifer J. Frost, Lori Frohwirth, Nakeisha Blades, et al., *Publicly Funded Contraceptive Services at U.S. Clinics, 2015*, Guttmacher Institute, April 2017, https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015. Click "Go to state and county maps," then choose "# of clients served at Title X-funded clinics" from the pull-down menu.

[31] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, pp. 9, 21-22.

[32] Jennifer J. Frost, *U.S. Women's Use of Sexual and Reproductive Health Services: Trends, Sources of Care and Factors Associated with Use, 1995–2010*, Guttmacher Institute, May 2013, p. 1 https://www.guttmacher.org/report/us-womens-use-sexual-and-reproductive-health-services-trends-sources-care-and-factors.

[33] Fowler et al., *Family Planning Annual Report: 2016 National Summary*, p. 23.

[34] P.L. 115-141, Division H, Title II; P.L. 115-31, Division H, Title II.

[35] See "Requirements on the Use of Title X Funds in P.L. 115-141, Consolidated Appropriations Act, 2018" in CRS Report R45181, *Family Planning Program Under Title X of the Public Health Service Act*.

[36] U.S. Office of Management and Budget (OMB), *The Budget of the U.S. Government, Fiscal Year 2019, Appendix*, pp. 419, 483, https://www.whitehouse.gov/wp-content/uploads/2018/02/hhs-fy2019.pdf.

3158, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019. S. 3158 would fund Title X at the FY2018-enacted level, and would continue previous years' provisions in appropriations laws prohibiting the use of Title X funds for abortion, among other requirements. On July 23, 2018, the House Appropriations Committee reported H.R. 6470, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019. H.R. 6470 would provide no funding for Title X in FY2019.[37] During the House Appropriations Committee's bill markup, a committee amendment was defeated that would have funded Title X at the FY2018-enacted level and would have prohibited the bill's funds from being used to finalize, implement, administer, or enforce the Title X proposed rule.[38]

Proposed Rule on Statutory Requirements

On June 1, 2018, HHS published a proposed rule in the *Federal Register* to revise the regulations that implement the Title X Family Planning Program.[39] HHS accepted comments for 60 days, until July 31, 2018.[40] Discussed below are three major elements of the proposed rule that HHS aims to modify: (1) abortion-related activities, (2) grantee requirements, and (3) pertinent definitions. Provided in each discussion of the major elements is an explanation of how the proposed rule differs from current Title X rules and guidance.

Abortion-Related Activities

Abortion Information, Counseling, and Referral

Current Requirements

On July 3, 2000, OPA released a final rule with respect to abortion-related services in family planning projects.[41] The rule updated and revised regulations that had been promulgated in 1988.[42] The major revision revoked the "gag rule," which restricted family planning grantees

[37] Section 227 of the bill states: "None of the funds appropriated in this Act may be used to carry out Title X of the PHS Act."

[38] The defeated committee amendment stated: "None of the funds made available by this Act may be used to finalize, implement, administer, or enforce any rule amending part 59 of title 42, Code of Federal Regulations (relating to grants for family planning purposes), including proposed rules published by the Department of Health and Human Services in the Federal Register on June 1, 2018 (83 Fed. Reg. 25502 et seq.)." *Amendment to Labor, HHS, Education Appropriations Bill, 2019 Offered by Mrs. Lowey of New York*, July 11, 2018, https://plus.cq.com/pdf/amendment-5356259.pdf; U.S. House Committee on Appropriations, "Roll call vote no. 14," *Full Committee Markup - FY19 Labor, Health and Human Services, Education, and Related Agencies*, *Full Committee Votes*, July 11, 2018, https://docs.house.gov/meetings/AP/AP00/20180711/108538/HMKP-115-AP00-20180711-SD008.pdf; Andrew Siddons and Kellie Mejdrich, "Labor-HHS-Education Bill OK'd; Family Separation Changes Added," *CQ Committee Coverage*, July 11, 2018, http://www.cq.com/doc/committees-20180711397934.

[39] 83 *Federal Register* 25502.

[40] Public comments may be viewed at HHS, *Compliance with Statutory Program Integrity Requirements, Docket ID: HHS-OS-2018-0008*, https://www.regulations.gov/docket?D=HHS-OS-2018-0008.

[41] HHS, OPA, "Standards of Compliance for Abortion-Related Services in Family Planning Services Projects," 65 *Federal Register* 41270-41280, July 3, 2000, https://federalregister.gov/a/00-16758; and HHS, OPA, "Provision of Abortion-Related Services in Family Planning Services Projects," 65 *Federal Register* 41281-41282, July 3, 2000, https://federalregister.gov/a/00-16759.

[42] HHS, Public Health Service, "Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a

from providing abortion-related information. The regulation at 42 C.F.R. §59.5 had required, and continues to require, that abortion not be provided as a method of family planning. The July 3, 2000, rule amended the section to add the requirement that a project must give pregnant clients the opportunity to receive information and counseling on prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If a pregnant client requests such information and counseling, the project must give "neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling."[43]

Annual appropriations laws also direct that under Title X, "all pregnancy counseling shall be nondirective."[44] The preamble to the 2000 rule described nondirective counseling:

> "[G]rantees may provide as much factual, neutral information about any option, including abortion, as they consider warranted by the circumstances, but may not steer or direct clients toward selecting any option, including abortion, in providing options counseling."[45]

Proposed Rule

The proposed rule would remove the requirement that Title X projects *must* provide pregnant clients with the opportunity to receive abortion-related information, counseling, and referrals upon request. According to the Chief Executive Officer (CEO) of the Christian Medical Association (CMA), a supporter of this proposed rule, "[m]ost pro-life physicians such as [CMA] members cannot refer for abortion, because of conscience and because abortion violates longstanding medical ethics such as the Hippocratic [O]ath."[46] The preamble to the proposed rule

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Method of Family Planning; Standard of Compliance for Family Planning Services Projects," 53 *Federal Register* 2922, February 2, 1988. The 1988 rule was subsequently challenged in court. The Supreme Court upheld the rule's constitutional and statutory validity in Rust v. Sullivan, 500 U.S. 173 (1991); see CRS Report RL33467, *Abortion: Judicial History and Legislative Response*. In 1991 and 1992, HHS issued directives interpreting the 1988 rule (reprinted in Senate, *Congressional Record*, vol. 137, part 23 (November 23, 1991), p. 34397, https://www.govinfo.gov/app/details/GPO-CRECB-1991-pt23/; and "Family Planning," Senate, *Congressional Record*, vol. 138, part 5 (March 26, 1992), pp. 6930-6931, https://www.govinfo.gov/app/details/GPO-CRECB-1992-pt5/. These directives were challenged in court and enjoined; see *National Family Planning & Reproductive Health Association v. Sullivan*, 979 F.2d. 227 (1992). In 1993, the HHS Secretary suspended the rule (HHS, Public Health Service, "Standards of Compliance for Abortion-Related Services in Family Planning Service Projects," 58 *Federal Register* 7462, February 5, 1993).

[43] 42 C.F.R. 59.5(a)(5)(ii). Current program guidance further specifies that "[o]ptions counseling should be provided in accordance with recommendations from professional medical associations, such as ACOG [American College of Obstetricians and Gynecologists] and AAP [American Academy of Pediatrics]. A female client might wish to include her partner in the discussion; however, if a client chooses not to involve her partner, confidentiality must be assured.... Referral to appropriate providers of follow-up care should be made at the request of the client, as needed. Every effort should be made to expedite and follow through on all referrals. For example, providers might provide a resource listing or directory of providers to help the client identify options for care. Depending upon a client's needs, the provider may make an appointment for the client, or call the referral site to let them know the client was referred. Providers also should assess the client's social support and refer her to appropriate counseling or other supportive services, as needed." Gavin et al., "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."

On December 19, 2008, HHS published a provider conscience rule which, according to HHS at the time, was "inconsistent" with the requirement that Title X grantees provide clients with abortion referrals upon request (73 *Federal Register* 78087). The rule was later rescinded in 2011 (76 *Federal Register* 9968).

[44] Consolidated Appropriations Act, 2018, P.L. 115-141, Division H, Title II.

[45] OPA, "Standards of Compliance for Abortion-Related Services in Family Planning Services Projects," 65 *Federal Register* 41273, July 3, 2000.

[46] The Christian Medical Association (CMA) is a subsidiary entity of the Christian Medical & Dental Associations

maintains that the current requirement conflicts with several conscience protection laws[47] and the restriction on using Title X funds "in programs where abortion is a method of family planning."[48] The President of the American Academy of Family Physicians (AAFP), a health care professional organization, states that "the Academy respects the right of physicians to decline to participate in health care services that [they are] morally opposed to."[49]

The proposed rule would remove the current requirement on abortion-related information, counseling, and referrals, replacing it with a requirement that projects "[n]ot provide, promote, refer for, support, or present abortion as a method of family planning."[50] The proposed rule would also prohibit Title X projects from taking "any other affirmative action to assist a patient to secure such an abortion."[51]

Opponents of this proposed provision, such as the National Association of Community Health Centers (NACHC) and the Guttmacher Institute, argue that this provision violates medical ethics because a pregnant client and her Title X provider would not be able to engage in an *informed consent* conversation.[52] An informed consent conversation refers to a patient's access to medical

(CMDA), which serves as a professional membership association for Christian healthcare professionals and students. See CMDA, "CMA Doctors Support Administration Proposal to Tighten Abortion-Related Safeguards in Family Planning Funding," press release, May 18, 2018, https://cmda.org/pressrelease/cma-doctors-support-administration-proposal-to-tighten-abortion-related-safeguards-in-family-planning-funding/; and CMDA, *About Us*, https://www.cmda.org/about/. See also Jonathan Imbody, *HHS proposed Title X rule 1805 - CMA and F2C comment*, Christian Medical Association and Freedom2Care, July 23, 2018, https://www.regulations.gov/document?D=HHS-OS-2018-0008-69125; Letter from Jennifer Popik, J.D., Director of Federal Legislation, National Right to Life Committee, to Valerie Huber, Senior Policy Advisor, OPA, July 27, 2018, https://www.regulations.gov/document?D=HHS-OS-2018-0008-155203; and Donna J. Harrison, M.D., *Proposed statement of support for Compliance with Statutory Program Integrity Requirements Final Rule*, The American Association of Pro-Life Obstetricians and Gynecologists, July 31, 2018, https://www.regulations.gov/document?D=HHS-OS-2018-0008-127340.

[47] 83 *Federal Register* 25512. The preamble cites several conscience protection statutes, including 42 U.S.C. 300a-7(d), which states, "No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." The preamble also cites the Weldon Amendment, which states, "None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." (P.L. 115-141, Division H, Title V, §507(d))

[48] 83 *Federal Register* 25505. 42 U.S.C. 300a-6 (Public Health Service Act §1008).

[49] The American Academy of Family Physicians (AAFP) serves as a professional membership association for physicians and students in the primary care field of medicine. The organization is not religiously affiliated. See Michael Munger, *Physicians to Administration: Stay Out of Doctor-Patient Relationship*, AAFP, May 23, 2018, https://www.aafp.org/news/opinion/20180523prezmsgtitlex.html; and AAFP, *Family Medicine Specialty*, https://www.aafp.org/about/the-aafp/family-medicine-specialty.html. AAFP has expressed concerns about the proposed rule; see American Academy of Family Physicians, "AAFP to HHS: Protect the Patient-Physician Relationship; Preserve Access to Family Planning Methods," press release, July 26, 2018, https://www.aafp.org/media-center/releases-statements/all/2018/aafp-to-hhs-protect-patient-physician-relationship-preserve-access-to-family-planning-methods.html.

[50] 83 *Federal Register* 25530.

[51] 83 *Federal Register* 25531.

[52] The National Association of Community Health Centers (NACHC) serves as a national health advocacy organization for community health centers. The Guttmacher Institute is a research and policy organization that focuses solely on sexual and reproductive health. (The Guttmacher Institute was originally, but is no longer, part of the Planned Parenthood Federation of America.) See Amy Simmons, *New: NACHC Statement Regarding the Proposed Rule for Title X Funding*, NACHC, June 5, 2018, http://www.nachc.org/news/new-nachc-statement-regarding-the-proposed-rule-for-title-x-funding/; and Kinsey Hasstedt, "A Domestic Gag Rule And More: The Trump Administration's Proposed Changes To Title X," *Health Affairs Blog*, June 18, 2018, https://www.healthaffairs.org/do/10.1377/

information that would enable the patient to make medical decisions and ask questions about his or her care.[53] The American Medical Association (AMA)'s Code of Medical Ethics states that "withholding medical information from patients without their knowledge or consent is ethically unacceptable."[54] During an optimal informed consent conversation, according to AMA, health care providers should "assess the patient's ability to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision."[55]

Under the proposed rule, Title X physicians would be permitted, but not required, to provide nondirective abortion counseling. The preamble to the proposed rule states: "Recognizing, however, the duty of a physician to promote patient safety, a doctor would be permitted to provide nondirective counseling on abortion."[56] The preamble to the proposed rule, in a footnote, describes nondirective counseling:

> Non-directive counseling does not mean the Title X provider or counselor is uninvolved in the process, nor does it mean that counseling and education offer no direction, but that clients take an active role in processing their experiences and identifying the direction of the interaction. The Title X provider/counselor promotes the client's self-awareness and empowers the client to change and develop agency over personal circumstances, offering a range of options, consistent with the client's expressed need and with the statutory and regulatory requirements governing the Title X program.[57]

Under the proposed rule, if a pregnant client "clearly states that she has already decided to have an abortion," a "medical doctor may provide a list of licensed, qualified, comprehensive health service providers (some, but not all, of which also provide abortion, in addition to comprehensive prenatal care)."[58] The preamble to the proposed rule notes that "the list may not identify in any way the providers that perform abortions in addition to comprehensive prenatal care."[59] Therefore, if the rule is finalized, a Title X provider would be prohibited from knowingly referring a pregnant client to an abortion provider. All other clients may be provided, upon a request, a list of comprehensive health service providers who do not provide abortions.[60] The proposed rule further states that all pregnant clients must be referred for prenatal and/or social services:

> Because Title X funds are intended only for family planning, once a client served by a Title X project is medically verified as pregnant, she must be referred for appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or

hblog20180614.838675/full/.

[53] The American Medical Association (AMA) serves as a membership, training, and advocacy organization for physicians, dentists, and medical and dental students. See AMA, *Informed Consent*, https://www.ama-assn.org/delivering-care/informed-consent.

[54] "AMA Code of Medical Ethics' Opinions on Informing Patients: Opinion 8.082 - Withholding Information from Patients," *AMA Journal of Ethics*, July 2012, https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinions-informing-patients/2012-07.

[55] AMA, *Informed Consent*, https://www.ama-assn.org/delivering-care/informed-consent.

[56] 83 *Federal Register* 25507. The preamble and the proposed rule are silent on whether non-physician providers would be permitted to provide nondirective abortion counseling.

[57] 83 *Federal Register* 25512, footnote 41.

[58] 83 *Federal Register* 25531.

[59] 83 *Federal Register* 25518 n.56. The preamble to the proposed rule also notes that in cases of rape or incest, a patient may be referred to a licensed, qualified, comprehensive health provider who also provides abortion. In such cases, the Title X provider must comply with all state and local reporting and notification laws, and document the compliance in the patient's record. 83 *Federal Register* 25518 n.54.

[60] 83 *Federal Register* 25531.

> adoption), and shall be given assistance with setting up a referral appointment to optimize the health of the mother and unborn child. She must also be provided with information necessary to protect her health and the health of the unborn child until such a time as the referral appointment is kept. In cases in which emergency care is required, the Title X project shall only be required to refer the client immediately to an appropriate provider of emergency medical services.[61]

Separating Title X Projects from Abortion-Related Activities

Current Requirements

Under 42 U.S.C. 300a-6 (Section 1008 of the Public Health Service Act), Title X funds may not be used "in programs where abortion is a method of family planning."[62] Under current program guidelines, a grantee's abortion activities must be "separate and distinct" from the Title X project activities; however, in some cases, a grantee's Title X project activities and its abortion activities may have a common facility, a common waiting room, common staff, and a common records system:

> Non-Title X abortion activities must be separate and distinct from Title X project activities. Where a grantee conducts abortion activities that are not part of the Title X project and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities. What must be looked at is whether the abortion element in a program of family planning services is so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost...
>
> Separation of Title X from abortion activities does not require separate grantees or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008.
>
> Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) a common waiting room is permissible, as long as the costs are properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion-related activities of the staff members are performed in a program which is entirely separate from the Title X project; (c) a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated.[63]

Proposed Rule

The preamble to the proposed rule maintains that current guidelines create a risk of intentional or unintentional violations of Section 1008.[64] HHS has concerns about whether Title X projects that operate in health care facilities that provide abortions are unintentionally comingling Title X

[61] Ibid.

[62] 42 U.S.C. 300a-6 (Public Health Service Act §1008).

[63] See the section "Separation" in HHS, OPA, "Provision of Abortion-Related Services in Family Planning Services Projects," 65 *Federal Register* 41282, July 3, 2000, https://federalregister.gov/a/00-16759.

[64] 83 *Federal Register* 25507.

funds with funds used to cover abortion-related expenses.[65] For that reason, the proposed rule would require Title X projects to maintain physical and financial separation from abortion-related activities, including abortion provision, referral, and "activities that encourage, promote or advocate for abortion."[66] The HHS Secretary would determine whether Title X projects have an "an objective integrity and independence" from prohibited abortion-related activities, based on several factors, including

> (a) The existence of separate, accurate accounting records;
>
> (b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities;
>
> (c) The existence of separate personnel, electronic or paper-based health care records, and workstations;
>
> (d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.[67]

In addition, the proposed rule would prohibit the use of Title X funds to build infrastructure for prohibited abortion-related activities.[68] Examples of infrastructure building include staff training, community outreach and recruiting, health information technology development, and obtaining physical space.[69] This provision of the proposed rule might make it difficult for abortion providers, such as the Boulder Valley Women's Health Center[70] and certain PPFA-affiliated health centers, to receive Title X funds.[71] For example, Title X funds enable PPFA-affiliated health centers to provide reproductive health services to an estimated 41% of Title X clients.[72] The proposed rule would not prohibit PPFA from applying to become a Title X grantee in the future. However, if this rule were to be finalized, some PPFA-affiliated health centers would have to restructure their current delivery of Title X services. For example, PPFA-affiliated health centers would have to refrain from providing abortion-related services in the same examination rooms that receive Title X funds. Some PPFA-affiliated health centers would also have to separate waiting rooms, entrances and exits, and websites, to maintain separation from abortion-related services.

[65] 83 *Federal Register* 25508-25509.

[66] 83 *Federal Register* 25532.

[67] 83 *Federal Register* 25532.

[68] 83 *Federal Register* 25533.

[69] 83 *Federal Register* 25508.

[70] Boulder Valley Women's Health Center is the only Title X provider in Colorado that provides abortion-related services. See Boulder Valley Women's Health Center, *The Domestic Gag Rule, Explained*, May 22, 2018, https://www.boulderwomenshealth.org/blog/domestic-gag-rule. However, the potential impact of the proposed rule extends beyond PPFA-affiliated health centers.

[71] Letter from Ron Estes, U.S. House Representative, Vicky Hartzler, U.S. House Representative, and Diane Black, U.S. House Representative, et al. to The Honorable Alex Azar, Secretary of HHS, April 30, 2018, https://black.house.gov/sites/black.house.gov/files/documents/Rep.%20Black%20Title%20X-%20Final%20Copy.pdf.

[72] Jennifer J. Frost, Lori Frohwirth, Nakeisha Blades, et al., Publicly Funded Contraceptive Services At U.S. Clinics, 2015, Guttmacher Institute, April 2017, pp. 1, 9, https://www.guttmacher.org/sites/default/files/report_pdf/publicly_funded_contraceptive_services_2015_3.pdf.

Grantee Requirements

Reporting

Current Requirements

Current Title X regulations do not specify reporting requirements. Title X grantees are subject to several reporting requirements, but they are not laid out in the Title X regulations in the *Code of Federal Regulations* (42 C.F.R. 59). For example, separately from the Title X regulations, family planning services grantees are required to submit a *Family Planning Annual Report* (FPAR), including counts of their subrecipients and service sites.[73] OPA is currently working to develop a new data reporting system, FPAR 2.0, which will be used to collect data directly from Title X service sites.[74]

Annual appropriations laws state that Title X providers are not exempt from state notification and reporting laws on child abuse, child molestation, sexual abuse, rape, or incest.[75] Program guidance requires Title X projects' training plans to include "routine" staff training on reporting requirements regarding child abuse, child molestation, sexual abuse, rape, incest, and human trafficking.[76]

Proposed Rule

The proposed rule would require Title X grantees to report detailed information on subrecipients and referral agencies, including a "clear explanation of how the grantee will ensure adequate oversight and accountability for quality and effectiveness of outcomes among subrecipients and those who serve as referrals for ancillary or core services."[77]

The proposed rule also states:

> Title X projects shall comply with all State and local laws requiring notification or reporting of child abuse, child molestation, sexual abuse, rape, incest, intimate partner violence or human trafficking (collectively, "State notification laws").[78]

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[73] HHS, OPA, *Family Planning Annual Report,* https://www.hhs.gov/opa/title-x-family-planning/fp-annual-report/index.html. Examples of additional reporting requirements are in section 13.5, "Financial and reporting requirements," HHS, OPA, *Program Requirements for Title X Funded Family Planning Projects*, p. 20, April 2014, https://www.hhs.gov/opa/sites/default/files/ogc-cleared-final-april.pdf; HHS, OPA, *Grant Forms and References*, https://www.hhs.gov/opa/grants-and-funding/forms-and-references/index.html; HHS, OPA, *Title X Family Planning Services – Annual Progress Report Guidance*, https://www.hhs.gov/opa/title-x-family-planning/training-and-resources/documents-and-tools/title-x-family-planning-services-annual-progress-report/index.html.

[74] HHS, OPA, *The Family Planning Annual Report and Health Information Technology (Health IT) Initiative (FPAR 2.0)*, https://www.hhs.gov/opa/title-x-family-planning/fp-annual-report/health-information-technology/index.html.

[75] In the Consolidated Appropriations Act, 2018, this provision appears at P.L. 115-141, Division H, Title II, §208. This requirement has appeared in annual appropriations acts since the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P.L. 105-277, Title II, §219, 112 Stat. 2681-363.

[76] Section 8.6.2 in HHS, OPA, *Program Requirements for Title X Funded Family Planning Projects*. The Family Planning National Training Center provides training in Rebecca Gudeman and Erica Monasterio, *Mandated Child Abuse Reporting Law: Developing and Implementing Policies and Training*, Family Planning National Training Center for Service Delivery, 2014, https://www.fpntc.org/sites/default/files/resources/fpntc_mandrpt_lawguid_2014_0.pdf.

[77] 83 *Federal Register* 25530.

[78] 83 *Federal Register* 25532.

With regard to these state notification laws, a Title X project would be required to provide documentation or assurances that it has a compliance plan.[79] The compliance plan would include

- a summary of obligations under state notification laws, including obligations to determine the ages of minor clients and minor clients' sexual partners;
- annual staff training;
- protocols to ensure that every minor who presents for treatment is counseled on how to resist attempted coercion into sexual activity; and
- a commitment to conduct a preliminary screening to rule out victimization after a minor under the age of consent presents with an STD, pregnancy, or any suspicion of abuse.[80]

Under the proposed rule, Title X projects would have to maintain records demonstrating compliance with the above requirements, and the HHS Secretary may review grantees' and subrecipients' records to ensure compliance.[81]

Services

Current Requirements

Currently, Title X projects must, among other requirements,

> [p]rovide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services.[82]

Proposed Rule

The proposed rule would remove the requirement that the provided family planning methods be "medically approved." HHS contends that "medically approved" does not appear in the Title X statute, and that the phrase may cause confusion about which approvals would be required before a method can be offered.[83] The proposed rule would state that family planning methods include contraceptives and that infertility services include adoption.[84] The proposed rule would also state that Title X projects are not required to provide every acceptable and effective family planning method or service.[85] According to the President of AAFP, this proposed rule "threatens to create obstacles for patients who are trying to receive legal, medically appropriate and acceptable

[79] 83 *Federal Register* 25532-25533.

[80] Ibid.

[81] 83 *Federal Register* 25533.

[82] 42 C.F.R. 59.5(a)(1).

[83] 83 *Federal Register* 25515.

[84] 83 *Federal Register* 25529.

[85] The preamble to the proposed rule lists the following examples of permitted family planning methods: male condom, spermicide, cervical cap, fertility awareness based methods, female condom, diaphragm, vaginal contraceptive ring, IUD, oral contraceptives, shot/injection, implantable rod, vasectomy, and sexual risk avoidance (or avoiding sex). In deciding which methods to provide, the preamble states that grantees and subrecipients may consider costs, staffing, technological capacity, and conscience concerns (83 *Federal Register* 25516).

medical services."[86] The current regulatory provision would be revised as follows (with italics indicating new language and strike-throughs indicating deleted language):

> Provide a broad range of acceptable and effective ~~medically-approved~~ family planning methods (including *contraceptives*, natural family planning *and other fertility-awareness based* methods) and services (including infertility services, *including adoption*, and services for adolescents). ~~If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services~~. *Such projects are not required to provide every acceptable and effective family planning method or service. A participating entity may offer only a single method or a limited number of methods of family planning as long as the entire project offers a broad range of such family planning methods and services*.[87]

This provision of the proposed rule may potentially be at tension with the Healthy People 2020 federal campaign's objective to "increase the proportion of publicly funded family planning clinics that offer the full range of methods of contraception [that are approved by the Food and Drug Administration (FDA) of HHS], including emergency contraception, onsite."[88] In 2010, 53.6% of publicly funded family planning clinics offered a full range of FDA-approved methods of contraception onsite.[89] The federal campaign seeks to reach a target of 67% by 2020.

Family Participation and Minors

Current Requirements

Appropriations laws require grantees to certify that they encourage "family participation" when minors seek family planning services and to certify that they counsel minors on how to resist attempted coercion into sexual activity.[90] Title X program guidance instructs grantees to comply with these and other appropriations act mandates.[91] Under OPA's FY2018 Title X funding opportunity announcement (FOA), a client under the age of consent will be subject to a preliminary screening to rule out victimization after he or she presents with an STD, pregnancy, or any suspicion of abuse.[92] This requirement is not in current regulations. For the purposes of

[86] Michael Munger, *Physicians to Administration: Stay Out of Doctor-Patient Relationship*, AAFP, May 23, 2018, https://www.aafp.org/news/opinion/20180523prezmsgtitlex.html. See also Letter from Lisa M. Hollier, MD, MPH, FACOG, President, American College of Obstetricians and Gynecologists, to The Honorable Alex Azar, Secretary, U.S. Department of Health and Human Services, July 31, 2018, https://www.regulations.gov/document?D=HHS-OS-2018-0008-179339; and Letter from James L. Madera, MD, Executive Vice President, CEO, American Medical Association, to The Honorable Alex Azar, Secretary, U.S. Department of Health and Human Services, July 31, 2018, https://www.regulations.gov/document?D=HHS-OS-2018-0008-179739.

[87] 83 *Federal Register* 25530.

[88] Every 10 years, the U.S. Department of Health and Human Services (HHS) Healthy People Initiative provides national objectives for improving health. The Healthy People 2020 objectives were announced in 2010. Office of Disease Prevention and Health Promotion (ODPHP) within HHS, *Family Planning*, https://www.healthypeople.gov/2020/topics-objectives/topic/family-planning/objectives.

[89] Ibid.

[90] P.L. 115-141, Division H, Title II, §207.

[91] Section 9.12 in HHS, OPA, *Program Requirements for Title X Funded Family Planning Projects*. An example of past guidance is at *OPA Program Instruction Series, OPA 11-01: Title X Grantee Compliance with Grant Requirements and Applicable Federal and State Law, including State Reporting Laws*, Letter from Marilyn J. Keefe, Deputy Assistant Secretary for Population Affairs, to Regional Health Administrators, Regions I-X; Title X Grantees, March 1, 2011, https://web.archive.org/web/20140428184014/http://www.hhs.gov/opa/pdfs/opa-11-01-program-instruction-re-compliance.pdf.

[92] HHS, OPA, "FY2018 Announcement of Anticipated Availability of Funds for Family Planning Services Grants," p.

determining eligibility for Title X discounts or free services, current rules state that "unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources."[93]

Proposed rule

Under the proposed rule, minors who want confidential services would continue to be considered on the basis of their own resources.[94] Regarding the medical records of minors, projects would have to document how they encouraged "family participation" in a minor's decision to seek family planning services (unless the minor is a suspected victim of abuse or incest).[95]

The proposed rule would require that Title X providers conduct preliminary screenings on clients who are under the age of consent.[96] OPA's FY2018 FOA has a similar requirement.[97] The goal of the preliminary screening is to rule out victimization after a client presents with an STD, pregnancy, or any suspicion of abuse. In the United States, the two most common forms of STD that are reported for youth aged 0-19 are chlamydia and gonorrhea (see **Table 1**).

Table 1. The Number of U.S. Reported Cases of Chlamydia and Gonorrhea for Youth Aged 0-19, 2016

Age Groups	Number of U.S. Reported Cases of Chlamydia	Number of U.S. Reported Cases of Gonorrhea
Children aged 0-4 years	597	187
Children aged 5-9 years	188	98
Children aged 10-14 years	10,571	2,436
Teens aged 15-19 years	407,230	80,172
Total number of reported cases of chlamydia and gonorrhea for youth aged 0-19	**418,586**	**82,893**

9, https://www.hhs.gov/opa/sites/default/files/FY18%20Title%20X%20Services%20FOA_Final_Signed.pdf. Although not limited to minors, current program guidance also recommends that "providers should screen women of childbearing age for intimate partner violence and provide or refer women who screen positive to intervention services, in accordance with USPSTF [U.S. Preventive Services Task Force] (Grade B) recommendations." (Gavin et al., "Providing Quality Family Planning Services: Recommendations of Centers for Disease Control and Prevention [CDC] and the U.S. Office of Population Affairs."). Currently, USPSTF recommends that "clinicians screen women of childbearing age for intimate partner violence (IPV), such as domestic violence, and provide or refer women who screen positive to intervention services.... These recommendations apply to asymptomatic women of reproductive age.... Reproductive age is defined across studies as ranging from 14 to 46 years, with most research focusing on women age 18 years or older.... Although all women are at potential risk for abuse, factors that elevate risk include young age.... " (U.S. Preventive Services Task Force, *Final Recommendation Statement: Intimate Partner Violence and Abuse of Elderly and Vulnerable Adults: Screening*, January 2013, https://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/intimate-partner-violence-and-abuse-of-elderly-and-vulnerable-adults-screening).

[93] 42 C.F.R. §59.2, §59.5(a)(7)&(8). See also Section 8.4.5 in HHS, OPA, *Program Requirements for Title X Funded Family Planning Projects*.

[94] 83 *Federal Register* 25514, 25530.

[95] 83 *Federal Register* 25530.

[96] 83 *Federal Register* 25533.

[97] HHS, OPA, "FY2018 Announcement of Anticipated Availability of Funds for Family Planning Services Grants," p. 9.

Source: Table prepared by CRS based on data from Centers for Disease Control and Prevention (CDC), *Sexually Transmitted Disease Surveillance 2016*, September 21, 2017, p. 72 and 84.

Note: In 2016, a total of 1,598,354 cases of chlamydia and 468,514 cases of gonorrhea were reported in the United States.

Current Requirements

Current regulations require Title X projects to provide for "necessary referral to other medical facilities when medically indicated" and "coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs."[98] Current program guidance further states that "providers of family planning services that do not have the capacity to offer comprehensive primary care services should have strong links to other community providers to ensure that clients have access to primary care."[99]

Proposed Rule

The proposed rule would add a new requirement on access to comprehensive primary care, either onsite or in close physical proximity:

> In order to promote holistic health and provide seamless care, Title X service providers should offer either comprehensive primary health services onsite or have a robust referral linkage with primary health providers who are in close physical proximity to the Title X site.[100]

Title X-funded clinics serve primarily low-income women and adolescents. The lack of transportation for this population is an access barrier to care.[101] In view of that fact, some Title X clients were offered public transportation vouchers worth $5 in exchange for their participation in a study on health insurance coverage of contraception at Title X-funded clinics.[102] In an older study of family planning clinics in four states, 77% of Title X clinics reported that they either provided transportation assistance (such as ride services or subsidized taxis) or were accessible by public transportation.[103] According to the Department of Transportation, lack of transportation causes approximately 3.6 million people to miss or arrive late to medical appointments in the

42 C.F.R. 59.5(b)(1), (b)(8).

[99] Gavin et al., "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."

[100] 83 *Federal Register* 25530.

[101] Olga Khazan, "More Than a Gag Rule," *The Atlantic*, June 4, 2018, https://www.theatlantic.com/health/archive/2018/06/texas-trump-title-x/561905/; and Institute of Medicine (IOM), Committee on a Comprehensive Review of the HHS Office of Family Planning Title X Program, *A Review of the HHS Family Planning Program: Mission, Management, and Measurement of Results*, ed. Adrienne Stith Butler and Ellen Wright Clayton (Washington, DC: The National Academies Press, 2009), pp. 5 and 60, http://www.nap.edu/catalog/12585/a-review-of-the-hhs-family-planning-program-mission-management.

[102] Megan L. Kavanaugh, Mia R. Zolna, and Kristen L. Burke, "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 (September 2018), p. 3, https://onlinelibrary.wiley.com/doi/epdf/10.1363/psrh.12061.

[103] Lorraine V. Klerman, Kay A. Johnson, Chiang-hua Chang, et al., "Accessibility of Family Planning Services: Impact of Structural and Organizational Factors," *Maternal and Child Health Journal*, vol. 11, no. 1 (January 2007), pp. 19-26.

United States annually.[104] This new requirement may increase some Title X clients' access to care by removing some of their need for transportation.[105]

Some commentators suggest that the proposed rule may shift demand for health care services from PPFA-affiliated health centers, to federally qualified health centers (commonly referred to as *health centers* and *community health centers*).[106] According to the National Association of Community Health Centers (NACHC), the adoption of the proposed rule would cause confusion among community health centers that are Title X grantees.[107] NACHC states that

> [h]ealth centers are trusted providers in their communities. It is imperative that health center patients feel confident that they are receiving comprehensive, medically-informed and accurate information about health care from their doctors at all times. Should this proposed rule be adopted, health centers would have to choose between allowing federal regulations to dictate what they can and must discuss with their patients, and losing a critical source of revenue to support patient care. Either way, patients would not be well-served.[108]

Nevertheless and according to the CEO of Americans United for Life, a supporter of the proposed rule,

> Women can do much better than Planned Parenthood. Comprehensive, preventive healthcare centers outnumber Planned Parenthood 20 to 1, and that's where women receive genuine expert care without the shadow of abortion hanging over them.[109]

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[104] Department of Transportation, *Transit & Health Access Initiative*, https://www.transit.dot.gov/ccam/about/initiatives. Transportation barriers are also discussed in Samina T. Syed, Ben S. Gerber, and Lisa K. Sharp, "Traveling Towards Disease: Transportation Barriers to Health Care Access," *Journal of Community Health*, vol. 38, no. 5 (October 2013), pp. 976-993, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4265215/.

[105] On the other hand, some of the proposed rule's critics argue that "some stand-alone family planning clinics, particularly in rural communities, may not be in close proximity to other primary health providers, and therefore may not qualify for funding. Excluding family planning clinics because they do not offer comprehensive primary care or are not near a primary care provider could make it more difficult for women, particularly in rural areas, to access the full range of family planning services that are available under the current program. Specialized family planning clinics have been shown to provide a wider range of contraceptive methods and higher quality family planning care than clinics providing comprehensive care, such as community health centers" (Laurie Sobel, Caroline Rosenzweig, and Alina Salganicoff, *Proposed Changes to Title X: Implications for Women and Family Planning Providers*, Kaiser Family Foundation, June 28, 2018, https://www.kff.org/report-section/proposed-changes-to-title-x-implications-for-women-and-family-planning-providers-issue-brief/).

[106] Sara Rosenbaum, Susan Wood, Julia Strasser, et al., "The Title X Family Planning Proposed Rule: What's At Stake For Community Health Centers?," *Health Affairs Blog*, June 25, 2018, https://www.healthaffairs.org/do/10.1377/hblog20180621.675764/full/. For background on health centers, see CRS Report R43937, *Federal Health Centers: An Overview*.

[107] Amy Simmons, *New: NACHC Statement Regarding the Proposed Rule for Title X Funding*, National Association of Community Health Centers, June 5, 2018, http://www.nachc.org/news/new-nachc-statement-regarding-the-proposed-rule-for-title-x-funding/.

[108] Ibid.

[109] Americans United for Life (AUL) is an independent pro-life news agency. See Steven Ertelt, "President Trump Makes Planned Parenthood Defunding Official, Rule Would Cut $60 Million in Taxpayer Funding," *LifeNews.com*, May 23, 2018, http://www.lifenews.com/2018/05/23/president-donald-trump-makes-planned-parenthood-defunding-official-rule-would-cut-60-million-in-taxpayer-funding/. According to the HRSA, there are more than 11,400 health centers. In comparison, there are more than 600 Planned Parenthood-affiliated clinics. (HRSA, *HRSA Data Warehouse, Health Center Delivery Sites*, https://datawarehouse.hrsa.gov/topics/hccsites.aspx); PPFA, *Planned Parenthood By the Numbers*, January 2018, https://www.plannedparenthood.org/uploads/filer_public/27/8a/278af3a4-8b4c-4289-bfe6-52ee2c3c048a/pp_by_the_numbers_2018.pdf).

In 2015, the Guttmacher Institute surveyed a nationally representative sample of publicly funded family planning clinics. Respondents included 535 Title X clinics. Based on that survey, an estimated 38% of Title X clinics reported providing primary care services.[110]

Pertinent Definitions

Family Planning

Current Requirements

Neither the Title X statute nor the existing regulations define "family planning." A core set of family planning services is defined in program guidance, "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs," which states,

> Family planning services include the following:
>
> --providing contraception to help women and men plan and space births, prevent unintended pregnancies, and reduce the number of abortions;
>
> --offering pregnancy testing and counseling;
>
> --helping clients who want to conceive;
>
> --providing basic infertility services;
>
> --providing preconception health services to improve infant and maternal outcomes and improve women's and men's health; and
>
> --providing sexually transmitted disease (STD) screening and treatment services to prevent tubal infertility and improve the health of women, men, and infants.[111]

Proposed Rule

The proposed rule would add a new definition:

> "Family planning" means the voluntary process of identifying goals and developing a plan for the number and spacing of children and the means by which those goals may be achieved. These means 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). Family planning services include preconceptional counseling, education, and general reproductive and fertility health care to improve maternal and infant outcomes, and the health of women, men, and adolescents who seek family planning services, and the prevention, diagnosis, and treatment of infections and diseases which may threaten childbearing capability or the health of the individual, sexual partners, and potential future children). Family planning and family planning services are never coercive and are strictly voluntary. Family planning does not include postconception care (including obstetric or prenatal care) or abortion as a method

[110] Publicly Funded Family Planning Clinics in 2015: Patterns and Trends in Service Delivery Practices and Protocols, Guttmacher Institute, November 2016, pp. 30 and 36, https://www.guttmacher.org/sites/default/files/report_pdf/publicly-funded-family-planning-clinic-survey-2015_1.pdf.

[111] Gavin et al., "Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Population Affairs."

> of family planning. Family planning, as supported under this subpart, should reduce the incidence of abortion.[112]

The preamble to the proposed rule states that physical examinations, breast and cervical cancer screenings, STD and HIV testing, and pregnancy testing and counseling would continue to be authorized under this definition as part of "general reproductive and fertility health care."[113]

Low-Income Family

Current Requirements

Priority for Title X services is given to persons from low-income families, who may not be charged for care. Current regulations define *low-income family* as having income at or below 100% of the federal poverty guidelines.[114] The guidelines vary by family size and are updated annually for inflation (with some adjustments for rounding). The 2018 federal poverty guideline for one person in the contiguous 48 states and the District of Columbia is $12,140 and increases by $4,320 for each additional person.[115] The regulation states that "[l]ow-income family also includes members of families whose annual family income exceeds this amount, but who, as determined by the project director, are unable, for good reasons, to pay for family planning services. For example, unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources."[116]

Proposed Rule

The proposed rule would expand the definition of "low-income family" to include women who cannot get job-based contraception coverage due to their employer's religious or moral objection:[117]

> With respect to contraceptive services, a woman can be considered from a "low-income family" if she has health insurance coverage through an employer which does not provide the contraceptive services sought by the woman because it has a sincerely held religious or moral objection to providing such coverage.[118]

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[112] 83 *Federal Register* 25529.

[113] 83 *Federal Register* 25513.

[114] 42 C.F.R. §59.2.

[115] In Alaska, the guidelines are $15,180 for one person and $5,400 for each additional person; in Hawaii, they are $13,960 for one person and $4,970 for each additional person. Office of the Assistant Secretary for Planning and Evaluation within HHS, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, https://aspe.hhs.gov/poverty-guidelines.

[116] 42 C.F.R. §59.2.

[117] Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) regulations and guidance require most nongrandfathered health plans to cover contraceptive services without cost-sharing. There are some exemptions and accommodations for religious objections. Interim final rules promulgated in October 2017 would expand exemptions to the contraceptive mandate. (Department of the Treasury, Department of Labor, and Department of Health and Human Services, "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act," 82 *Federal Register* 47838, October 13, 2017; Department of the Treasury, Department of Labor, and the Department of Health and Human Services, "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act," 82 *Federal Register* 47792, October 13, 2017). Courts have preliminarily enjoined the interim final rules from being implemented. See *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017).

[118] 83 *Federal Register* 25530.

Expansion of this definition would increase the Title X client population that could receive free contraceptives. If finalized, certain women would be eligible for free contraceptives regardless of their own or their family's income. Thus, changing the definition of "low-income family" may likely increase access to free contraception services for these women. This change may also increase Title X grantees' need for additional federal funds.

The proposed rule does not address whether or not priority for contraceptives would be given to women with incomes at or below the federal poverty level, versus the potential newly eligible women with higher annual incomes. Moreover, the preamble does not define the criteria that an employer must meet to be recognized as "sincerely [holding] religious or moral objections to providing [contraceptive] coverage."[119]

Regulatory Impact Analysis

In its regulatory impact analysis, OPA estimates that the proposed rule would cost $45.5 million in 2019 and $14.6 million in subsequent years (2020 to 2023).[120] With respect to the physical separation requirements, OPA estimates that between 10% and 20% of Title X service sites do not comply and would have to incur costs to come into compliance.[121] Costs would also be incurred for activities such as training, documentation, monitoring, enforcement, and reporting.[122]

OPA states that the proposed rule is expected to result in several benefits, including assurance that tax dollars are being used in compliance with the law, increased patient access, improved quality of services, and an expanded and more diverse field of medical professionals.[123] According to the preamble, some of these benefits would stem from the conscience-related provisions:

> For providers, the proposed regulation is expected to create benefits through respect for conscience. It would do so by better aligning the Title X regulations with the statutory prohibitions on discrimination against health care entities, including individual health care providers, who refuse to participate in abortion–related activity such as counseling and referrals. Potential grantees, and subrecipients that refuse to provide abortion counseling and referrals may now be eligible and interested in applying to provide family planning services under the current Title X regulations.[124]

Current Title X regulations might discourage some potential Title X grantees from applying. Some potential Title X grantees might not apply because current grantees *must* provide abortion referrals upon request. This requirement may clash with the religious and moral beliefs held by some potential grantees. For that reason, the finalization of this proposed rule might encourage more potential Title X grantees that hold such beliefs to apply.

The preamble further states that "the expansion of provider and family planning options would have salutary benefits for patients, including for patients who seek providers who share their religious or moral convictions."[125] A study of 1,430 religious reproductive-aged women (18-45 years old) found that 34.5% of the women felt that it was somewhat or very important to know

[119] Ibid.

[120] 83 *Federal Register* 25522.

[121] 83 *Federal Register* 25525.

[122] 83 *Federal Register* 25522-25525.

[123] 83 *Federal Register* 25525.

[124] 83 *Federal Register* 25526.

[125] 83 *Federal Register* 25526.

about a hospital's religious affiliation.[126] That same study also found that 80.7% of the religious women felt that it was somewhat or very important to know about a hospital's religious restrictions on reproductive care, prior to seeking the care.[127]

Compliance Dates

The proposed rule would require Title X projects to comply with its physical separation requirements one year after the final rule's publication. For other requirements, compliance would be required 60 days after the final rule's publication.[128]

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[126] Lori R. Freedman, Luciana E. Hebert, Molly F. Battistelli, et al., "Religious Hospital Policies on Reproductive Care: What Do Patients Want to Know?," *American Journal of Obstetrics and Gynecology*, vol. 218, no. 2 (February 2018), pp. 251.e1-251.e-9.

[127] Ibid.

[128] 83 *Federal Register* 25533.