A Communication from the Chief Legal Officers and Governor of the Following States:

Arkansas * Arizona * South Carolina Louisiana * Oklahoma * Texas * Nebraska Utah and Mississippi

October 7, 2016

Susan B. Moskosky, MS, WHNP-BC
Office of Population Affairs
Department of Health and Human Services
200 Independence Avenue, SW, Suite 716G
Washington, DC 20201

RE: Comment on RIN 937-AA04 (Proposed rules for Compliance with Title X Requirements by Project Recipients in Selecting Sub Recipients

Dear Ms. Moskosky:

The undersigned State Attorney Generals and Governor submit the following comments to the above-referenced rule. In addition to providing a wholly inadequate comment period, the proposed rules raise a number of grave concerns for the undersigned States, including wholly inadequate and incorrect regulatory impact analysis; inadequate analysis of federalism concerns and impacts; vague criteria which discriminates against men and adolescents; and the impermissible objective of superseding federal and state laws restricting the use of state and federal funding for abortions.

A. The Comment Period is Entirely too Short and Appears to be Intended to Curb Meaningful Comment from Impacted States.

At the outset, we strenuously object to the short time frame allowed for comment on the proposed rule. The proposed rule, as explained further below, has significant economic and federalism impacts. It will have a direct and immediate impact on state funding priorities and therefore it may critically imbalance state budgets. We are very concerned that the short time frame provided is not only insufficient to obtain meaningful feedback on the impact to the states, but that is was *intended* to do so. Notably, on the same page that this rule is published, the Coast Guard extended the time for comment on a proposed rule regarding *anchorage grounds on the Hudson River*. That proposed rule was published June 9, 2016, with an initial comment period of approximately 90 days. In light of the large number of comments and "to continue encouraging this important public discussion," the Coast Guard extended the comment period another four months. This proposed rule impact all 50 states and territories, the sub recipients of the grants

implemented by state grantees, clients served in the programs funded by Title X grants, and all the taxpayers who live in those states.[1] This is an important public discussion that merits much more time for comment than the mere 30 days provided.[2] It is evident from the examples provided in the Notice, which all focus on state actions, that the rule is *targeted* at states. Therefore, we respectfully request that the comment period be extended to 90 days *at a minimum* so that states can properly evaluate and comment upon the impact to their *laws*, *programs*, and *budgets* and provide the meaningful feedback that is contemplated by the rulemaking process.

B. The Rule Contains a Wholly Inadequate Economic Impact Analysis.

Agencies, pursuant to Executive Orders 12866 and 13563, are required to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select approaches that maximize net benefits. Moreover, the agency must evaluate whether the rule will have an annual effect on the economy of $100 million or more in at least one year.[3] Finally, the agency must analyze options for regulatory relief if the rule has significant impact on a substantial number of small entities. HHS's self-serving and conclusory impact statement in the Notice entirely ignores the real impacts of this proposed rule and does not examine any regulatory alternatives.

HHS apparently has not conducted any analysis at all because of its conclusion that the rule would not result in any expenditure by state or other governmental entities. This is entirely incorrect. States who have tiered programs or who have placed any funding priorities on the awards to sub recipients, if the rule is adopted, will be required to reorder their programs, adopt new rules for awarding grants, and conduct new competitive procedures to issue awards. The rule is *intended* to change the sub recipients, which necessarily means some may not receive an award or may receive less funds than they received before. This will, of course, have an economic impact. The Notice also focuses on prioritizing "specific provider types with a reproductive health focus," over public health units and public health departments. If funding to those entitles is reduced or lost, it must be replaced or programs may have to be terminated. It is,

[1] As of the day before the comment period closed, no public comments had been submitted on the rule. We submit this is precisely because insufficient time has been provided to review it.
[2] Agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content. 5 U.S.C. § 553 (b)-(c). Executive Order 12866, which provides for presidential review of agency rulemaking via the Office of Management and Budget's Office of Information and Regulatory Affairs, states that the public's opportunity to comment, "in most cases should include a comment period of not less than 60 days." Exec.Order No. 12866, § 6(a),58 Fed. Reg. 51735 (Oct. 4, 1993), and Executive Order 13563.
[3] The current threshold after adjustment for inflation is $146 million. The Notice states only that "[t]his proposed rule would not trigger the Unfunded Mandate Reform Act because it will not result in any expenditures by states or other government entities."

therefore, entirely incorrect to say this rule will not result in any expenditure by states or other governmental entities.

Moreover, as indicated in several places in the Notice, states can elect *not to participate* in this program, which would produce significant economic consequences for states, providers, and the recipients of services. Nothing in the Notice analyzes or even acknowledges this impact. The purpose is to *promote and assist* in the establishment of *voluntary* family planning projects that offer a broad range of acceptable and effective family planning methods and services.[4] The program is also targeted toward services for adolescents. This rule does not further that goal; but rather it is intended to protect funding for certain providers even at the expense of the entire program. If states elect to stop participating, a large number of people would lose services, a large number of people would lose their jobs, a large number of small businesses would be impacted, and state funding priorities across the board would be negatively impacted by this loss of funds.[5] HHS has not complied with the requirements of law to analyze these impacts, nor has it considered less intrusive regulatory options.

HHS has authority to directly issue grants to non-profit providers if it desires to do so. A far less intrusive regulatory construct would be to provide a more efficient means for a provider who may not be selected as a sub recipient to apply directly to HHS for a grant. That this is a viable option is evident in the example of New Hampshire, where HHS apparently issued an emergency replacement grant directly to the provider. Although HHS alleges some people experienced "a significant disruption in the delivery of services," it has not demonstrated that it could not remedy this problem *internally* with a more efficient direct grant system. This is certainly a less intrusive means of addressing the issue than adopting a rule that might result in states pulling out of the program entirely and that violates principles of federalism and commandeers state governments.

C. HHS Has Not Conducted an Adequate Analysis of Federalism Impacts.

Federal law prohibits subsidizing of abortion through the Title X program.[6] Many state laws similarly prohibit the use of state funds for abortions. Moreover, some states have made decisions related to Title X that are aimed at ensuring state funding priorities emphasize pregnancy prevention and that reflect a respect and preference for the preservation of life. These are permissible state objectives and may be factors in prioritizing sub recipients.

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[4] 42 U.S.C. §300(a).

[5] Louisiana, for example, is the sole Title X grantee, supporting 65 health centers across the state. The network served 35,653 women and 6,421 men in 2014. Title X- funded services produce significant costs savings to the federal and state governments. The cost of withdrawing from the program must also take into consideration the increased costs to Medicaid and to states who will experience and increase in unplanned pregnancies and other conditions.

[6] *See* 42 U.S.C. § 300a-6.

Rust v. Sullivan[7] upheld the constitutionality of HHS regulations prohibiting Title X family planning recipients from including abortion services, referrals or counseling in program activities. The Court specifically stated, "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[8] The Court affirmed that the government can selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.[9] Providers that still intend to engage in abortion-related services may "conduct those activities through programs that are separate and independent" from Medicaid-funded facilities, a rule the Court in *Rust* found constitutionally permissible for Title X grantees.[10]

Nothing in the Title X Family Planning Programs suggests that HHS has authority to adopt rules that, in effect, *protect* or provide a *preference for* certain providers, overriding state priorities that reasonably favor whole family planning and the preservation of life. The Fifth Circuit Court of Appeals ruled in *Planned Parenthood v. Suehs*, 692 F.3d 343 (5th Cir. 2012), that Texas' prohibition on providers of elective abortion and entities associated with abortion providers

[7] 500 U.S. 173, 196-99 (1991).
[8] *Id*. at 196.
[9] *Rust*, 500 U.S. at 193.
[10] *Id*. A recent federal trial court injunction against Kansas' exclusion of Planned Parenthood from its Title X program, *Planned Parenthood v. Brownback*, 799 F. Supp. 2d 1218 (D. Kan. 2011), *denying clarification*, 799 F.3d 1218, *rev'd sub nom*. *Planned Parenthood v. Moser*, 747 F.3d 814 (10th Cir. 2014), turned principally on two factors: 1) the absence of any opportunity for Planned Parenthood to apply to qualify as a Title X recipient (*id*. at 1229); and 2) statements by legislative sponsors and supporters of the bill that demonstrated an unconstitutional legislative purpose to single out Planned Parenthood as the target for de-funding because of its participation in legal elective abortion procedures (*id*. at 1230). (A North Carolina federal court decision involving that state's decision to specifically strip Planned Parenthood of funding, *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.D.N.C. 2012), is to the same effect.) The Tenth Circuit reversed the Kansas decision, holding that Planned Parenthood had no right to sue to enforce the provisions of Title X and that there was no unconstitutional legislative purpose in the bill. 747 F.3d at 817.

State agencies engaged in federal partnerships such as the Temporary Assistance to Needy Families Block Grant Program (Title IV), the Maternal and Child Health Services Block Grant Program (Title V), and the Social Services Block Grant Program (Title XX) have authority to administer such grants in a manner that reflects state policy, provided the implementation is congruent with federal mandates. Nothing in the statutes and implementing regulations for these programs prohibits state partners from directing grants to particular types of providers to maximize the effective delivery of preventive healthcare services. See generally 42 U.S.C. §§ 401, 403, 404 (purposes of and limitations on TANF grants); 42 U.S.C. § 704 (purposes of and limitations on Maternal and Child Health Services grants); and 42 U.S.C. §§ 1397, 1397d (purposes of and limitations on Social Services grants).

receiving public funds under the state Medicaid waiver program did not violate their First Amendment right of association or right to equal protection.[11] The Seventh Circuit Court of Appeals reached a similar conclusion in assessing Indiana's provision, similar to Section 4(b) of the proposed Act, reasoning that Indiana's differential treatment of providers of elective abortion was a permissible governmental preference. *Planned Parenthood of Indiana, Inc. v. Comm'r, Indiana State Dept. of Health*, 699 F.3d 962 (7th Cir. 2012).

The proposed rule observes that since 2011, 13 states have placed restrictions on or eliminated sub awards with specific types of providers "based on reasons unrelated to their ability to provide required services in an effective manner."[12] The proposed rule uses vague terms, such as "specific types of providers," as a thinly-veiled reference to state efforts to limit funding to abortion providers. State governments, however, have "a legitimate and substantial interest in preserving and promoting fetal life."[13] To further that end, States have authority to enact laws and policies that encourage childbirth over abortion,[14] including withholding taxpayer subsidies for abortion. As the Court has stated numerous times, "[T]he State need not commit *any* resources to facilitating abortions….",[15] and " a woman's freedom of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[16] Federal law reflects this policy choice through the Hyde Amendment, which prohibits funding for abortion except under certain extreme circumstances.[17]

We are extremely concerned about the overreach reflected in this rule and clear intent to override state laws and policy choices that are clearly legal and supported by Congress, affirmed by the Supreme Court, and overwhelmingly supported by the citizens of the states in which such legislative priorities are in place. The Notice provides only a conclusory and self-serving

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[11] A Texas State judge followed suit January 2013, ruling that Planned Parenthood had not established a right to a preliminary injunction against the de-funding under state law. *See* "Texas Judge Rules State Can Keep Planned Parenthood De-Funded," http://www.lifenews.com/2013/01/11/texas-judge-rules-state-can-keep-planned-parenthood-de-funded/ (Jan. 11, 2013).

[12] It is important to note that Title X is a completely different context from and different issue than the termination of Planned Parenthood as an unqualified provider for misconduct proscribed by federal law or state laws consistent with federal regulations. The States are not addressing that far different issue, although they wish to make clear that states may of course terminate a provider for such misconduct.

[13] *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).

[14] *Id*. at 146.

[15] *Webster v. Reproductive Health Servs*., 492 U.S. 490, 511 (1989) (emphasis supplied), citing *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519, 521 (1977), and *Maher v. Roe*, 432 U.S. 464 (1977).

[16] *Harris v. McRae*, 448 U.S. at 316.

[17] *See* Omnibus Appropriations Act of 2009, Pub. L. No. 118, §§ 507-08, 123 Stat. 524, 802-03 (2009) (enacting H.R. 1105).

statement that the rule has no federalism implications, when in fact the *entirety* of the rule is intended to impact state laws and state policy decisions. It is clearly in the best interest of the program that HHS withdraw the rule and give greater deference to the legitimate legislative and policy choices made by states.

D. The Rule Improperly Discriminates Against Men and Adolescents, Contrary to Anti-Discrimination Law and the Purpose of Title X.

The Notice shows HHS intends to impose a preference for prioritizing funding to "specific providers with a reproductive health focus." There is no definition for this phrase, which is problematic. The text of the Notice further indicates such providers should be preferred over public health units and departments and other federally qualified health centers. Given the references throughout the rule to the disqualification of Planned Parenthood, it is reasonable to assume HHS is referring to it, and possibly others. Providers who have a "reproductive health focus," it is reasonable to assume from the focus of the Notice, predominantly serve women. Public health clinics and health centers who provide *whole health services* are more likely to provide services to men and to male adolescents. For example, a teenage boy or an adult male with an STD is not likely to seek health care from a facility that has a "reproductive health focus." A teenage boy who might be eligible for the HPV vaccine is far more likely to receive information and the vaccine during a routine health care visit to a family clinic than from a provider with "a reproductive health focus." Statistically, the program already serves more women and girls than it does men. This would only be exacerbated by prioritizing sub recipients based upon whether they "have a reproductive health focus."

Because the Notice provides no definition for the phrase "reproductive health focus," it is difficult to ascertain what the actual impact would be on men and adolescents, but at a minimum states deserve to know how HHS interprets these terms and provide some kind of impact analysis. Because the actual proposed rule does not incorporate this phrase, the states deserve to know if HHS intends to incorporate this preference into the interpretation of the rule or official guidance. Title X is gender neutral – its focus is on promoting reproductive health and family planning generally and establishing vague preferences in the rules that disproportionately serve women only will not only hurt the overall mission but also suggest that women bear the greater responsibility in the prevention of unwanted pregnancies and in avoiding sexually transmitted disease.

E. Consolidating Grant Funding is Consistent with Federal Case Law.

In *Planned Parenthood Association of Utah, et al. v. Schweiker,*[18] the D.C. Circuit Court of Appeals affirmed the State of Utah's authority to act as sole grantee for the Title X program within the state (pursuant to a state statute) through a consolidated grant award from HHS

[18] 700 F.2d 710, 723-24 (D.C. Cir. 1983).

Region VIII. The federal agency's actions were pursuant to a policy of consolidating grants in the interests of efficiency and in view of limited funds availability.[19] The Title X regional administrator awarded the state health department the grant based on the department's assurances that it could and would provide family planning services to all eligible women that had previously been served by the State and two other providers.[20] Planned Parenthood and the other non-state provider sued, contending that HHS' actions violated their right to apply directly for grants and that its policy of favoring consolidated grants was unlawful.[21] The district court dismissed the lawsuit, holding that "not only did Congress not enact legislation prohibiting consolidated grants, but the pertinent legislative history evidences Congress' approval of consolidated grants where appropriate."[22] The award decision, said the court, was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[23] and was consistent with 'HHS' valid policy of grant consolidation" to "lower administrative costs and assure better delivery of services."[24] The court of appeals affirmed, concluding that Title X protected *only the right to apply for a grant, not to receive one*,[25] and that the consolidation process was consistent with congressional directions to encourage "better coordination of existing services"[26] and to "determine the degree of duplication and philosophical consistency existing in current Federal programs including family planning."[27] In fact, the court noted, federal law required HHS to favor consolidated grant applications where appropriate.[28] HHS remains under that mandate today.

Conclusion

In conclusion, the undersigned States submit this comment letter with great concern regarding both the substance and the impact of the proposed rule and the motivation of HHS in the proposed rule and the short time frame allowed for comment. HHS should, at a minimum, extend the time frame for comment. HHS has not provided adequate analysis of its economic impacts, its federalism impacts, or its discriminatory impact on men and adolescents. The rule has impacts that are contrary to the entire purpose Congress sought to achieve in approving the grant program. We urge HHS to withdraw the rule and engage in a meaningful discussion with

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19 In 1982, the court noted, consolidated grants had been awarded in 28 states, with 23 consolidated in state agencies and 5 in non-state agencies. 700 F.2d at 714.

20 *Id*. at 715.

21 *Id*. at 717.

22 *Id*. at 718.

23 *Id*., quoting 5 U.S.C. § 706(2)(A).

24 *Id*.

25 *Id*. at 723.

26 *Id*. at 724, quoting 42 U.S.C. § 300z(a)(10)(B).

27 *Id*., quoting S.Rep. No. 161, 97th Cong., 1st Sess. 16 (1981).

28 *Id*. at 726, citing 42 U.S.C § 300z-6(a)(4).

the States that respects legal policy choices that are consistent with federal policy favoring holistic reproductive health services.

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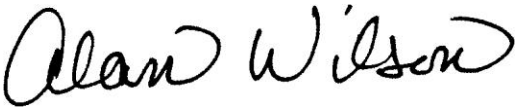

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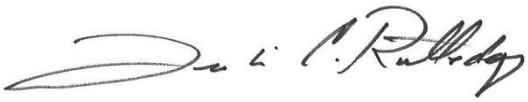

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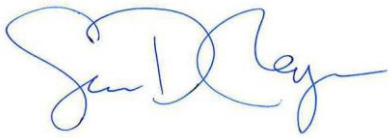

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