

**Congress of the United States**  
**Washington, DC 20515**

July 21, 2008

George W. Bush  
President  
United States of America  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear President Bush:

A draft regulation being circulated within HHS claims to seek to ensure that “Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law.” The true impact of the regulation, however, would be to jeopardize women’s access to safe and effective birth control across the country. We are writing to express our profound disagreement with the regulation and to urge you not to release it.

**The Draft Regulation**

The Department claims that the purpose of the proposed rule is to clarify and better enforce existing federal laws that prohibit discrimination against entities on the basis of opposition to abortion.<sup>1</sup> These laws, as well as statutes in many states, allow individuals and many health-care institutions to refuse to provide abortion care. However, the draft regulation acknowledges that “the proposed regulation may suggest interpretations of statutory terms that are broader than the interpretations many states or local governments may have followed to date.”

In fact, the regulation’s definitions are so broad as to go far beyond abortion politics and threaten virtually any law or policy designed to protect women’s access to safe and effective birth control.

The Department does this primarily by defining “abortion” in a way that could sweep in many common forms of birth control: “*Abortion*’ means any of the various procedures – including the prescription, dispensing, and administration of any drug or the performance of any procedure or any other action – that results in the termination of the

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<sup>1</sup> The “Church Amendments” (42 USC 300a-7), passed in the 1970s, prohibit various categories of federal grantees – including state and local governments - from “discriminating” against individuals for not wanting to perform abortions and against entities for not making their facilities or staff available for abortions based on “religious beliefs or moral convictions.” The Public Health Service Act contains a provision that prohibits the federal government and any state or local government receiving federal financial assistance from “discriminating” against any health care entity on the basis that the entity refuses to receive or provide abortion training; provide abortions or referrals for abortions; or provide referrals for abortion training. The law also specifically prohibits federal, state, or local government from withholding accreditation from any entity solely on the basis of refusing to perform any of the above. 42 USC 238n. The “Weldon Amendment,” originally adopted as part of the Labor-HHS appropriations bill in 2004 (P.L. 108-447) and included in subsequent appropriations (P.L. 110-161), says that no funds made available in that bill can go 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.”

life of a human being in utero between conception and natural birth, whether before or after implantation.” Because this is to be applied based on the provider’s beliefs, it would allow any provider who wants to deny a woman emergency contraception or even birth control pills to claim protection based on a personal belief that such pills fit the regulatory definition.

The Department also applies a very broad definition to the scope of providers who can claim the right to deny women access to birth control. Under the draft regulation, “‘*Assist in the Performance*’ means to participate in any activity with a logical connection to a procedure, health service or health service program, or research activity, so long as the individual involved is a part of the workforce of a [Department-funded] entity. This includes referral, training, and other arrangements for the procedure, health service, or research activity.” In a particularly absurd example, the Department states that “[a]n employee whose task it is to clean the instruments used in a particular procedure, would be considered to assist in the performance of the particular procedure.”

In addition, the proposed regulation would widely broaden the categories of healthcare entities who can demand protection for denying women access. The underlying statutory provisions are conceived of as “conscience clauses,” which many people think relates to an individual provider being permitted to act on his or her personal religious or moral beliefs. And in fact, some are written to apply narrowly to individual providers or to training programs for providers. But the proposed regulation would apply a very broad definition of “health care entity” to enforcement of all of the underlying statutes – giving corporate entities such as HMOs, health insurance plans, or any other health business the claim to a “conscience” and the “right” to deny a women access to birth control or other care.

### **Potential Impact**

By extending far beyond the terms of the underlying statutes, the draft regulation could have a disastrous effect upon access to safe and effective birth control for millions of women across the country.

Employees of federal grantees who do not wish to participate in abortion services currently do not have to. That has been true for decades. But under the regulation, any employee who wishes to deny a woman birth control could do so as well, invoking protection from “discrimination” to avoid any repercussions. In fact, this person could refuse to refer the woman elsewhere for birth control. Similarly, entire facilities getting state or local government support could refuse to make birth control available, making it potentially more difficult for women to obtain access to contraception.

Furthermore, the regulation could jeopardize state enforcement of laws designed to ensure that women receive essential healthcare at pharmacies. Multiple states have laws requiring pharmacists who refuse to dispense certain drugs to refer patients to another provider at the same facility or close by. The enforcement of these important laws could be compromised if HHS claims that they constitute “discrimination” against those who refuse to provide birth control.

These concerns are not hypothetical: the draft regulation makes quite clear that it intends to limit patient protections. In a section titled “The Problem,” it criticizes state laws that require employers who offer drug benefits to include coverage of contraception; laws that require hospitals to offer emergency contraception to rape survivors; and laws that require pharmacies to fill patients’ medical prescriptions even if individual pharmacists working there disagree.

The implications for the federal Medicaid and Title X programs are unclear but also potentially grave. Medicaid has a mandatory birth control benefit, and Title X by definition covers family planning services for low-income women. If taken to its logical extreme, the draft regulation could cause havoc by telling healthcare entities receiving these funds that they could, without repercussion, deny women access to birth control services.

What’s more, all of these threatened effects could occur independently of the sphere of “personal beliefs” that the statutory provisions have been assumed to address. In some cases, HMOs or other health insurance companies could deny women access to birth control for no reason at all – and then use the regulation to claim protection from “discrimination” if a state tries to enforce laws regarding access to contraception.

## **Conclusion**

The federal statutes at issue here were, in general, designed to shield different types of healthcare providers who did not wish to provide abortions. The draft regulation being circulated at HHS would go much further. By distorting the scope of the laws, it would gut state and local protections of women’s right to safe and effective birth control. This is not a technical clarification regarding abortion services. This is a radical reversal of decades of public health work to provide contraception and family planning services that have enjoyed wide bipartisan support.

In reconsidering this ill-conceived rule, we urge you to remember what your own father said in the Congress when he served as one of the key supporters of Title X: “We need to make population and family planning household words. We need to take sensationalism out of this topic so that it can no longer be used by militants who have no real knowledge of the voluntary nature of the program but, rather are using it as a political steppingstone. If family planning is anything, it is a public health matter.” The draft regulation moves in exactly the opposite direction from your father's stated goals and the longstanding implementation of the federal family planning activities.

We urge you to halt all action on this proposed regulation.

Sincerely,

Archie M. Looney

David DeYette

Tim Ryan

Jim Schekenshy

Harold Johnson

[Signature]

John W. Owee

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John Holt

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