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MEMORANDUM October 29, 2015

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Attention: James Mazol

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Subject: **Questions Concerning the Availability of Federal Funds for Planned Parenthood Federation of America and Its Affiliates**

This memorandum provides responses to a series of questions that were posed to CRS by Representative Bridenstine in correspondence dated October 7, 2015. In general, these questions involve the availability of federal funds for Planned Parenthood Federation of America ("PPFA") and its affiliates. The questions and responses are provided below. In some instances, the questions have been rephrased for technical consistency and to provide more direct responses. Because the information included in the responses may be of general interest to Congress, it may be used in future CRS products. If the information is used, your confidentiality as a requester will be preserved.

Can Congress use legislative provisions (commonly referred to as "riders") in appropriations bills, including continuing resolutions ("CRs") and omnibus appropriations acts, to directly affect mandatory spending programs (for example, the so-called "Hyde Amendment" legislative language)? Are there different implications for such provisions when they affect the use of mandatory spending that is provided outside the annual appropriations process (such as Medicare benefits), as opposed to provisions that affect only appropriated mandatory spending that is provided in appropriations acts (such as Medicaid)?[1]

Background

The internal rules of the House and Senate distinguish between provisions that provide authorizations and those that provide appropriations. Authorizing provisions establish the legal authority for government entities, activities, and programs. They also, either explicitly or implicitly, authorize subsequent

[1] The response to these questions was prepared by Edward C. Liu, Legislative Attorney, and Jessica Tollestrup, Specialist on Congress and the Legislative Process.

congressional action to provide appropriations to carry out those purposes. Appropriations provisions, by contrast, provide the authority for government agencies to obligate funds and make payments from the Department of the Treasury ("Treasury") for specified purposes.[2] This distinction is a construct of congressional rules and practices, and not a constitutional requirement.

The congressional budget process also differentiates between two types of spending: discretionary and mandatory. Discretionary spending is both controlled and funded through the annual appropriations process in appropriations acts. Mandatory spending is controlled through authorizing laws. Such spending may be funded through provisions in the authorizing law that contain appropriations for that purpose. Alternatively, when the authorizing law contains no language that allows payments from the Treasury without the further enactment of law, such mandatory spending is funded through the annual appropriations process. This is sometimes referred to as "appropriated mandatory" or "appropriated entitlement" spending.[3]

House and Senate rules prohibit "legislative" provisions from being included in appropriations measures under most circumstances. Legislative provisions in appropriations acts are defined as those that have the effect of making new law or changing existing law. A number of House and Senate precedents have identified certain principles that can be used to determine whether a provision is legislative and therefore not allowed under the rules. In total, these attempts can be distilled to several broad concepts involving whether the scope of the provision is restricted to the funds provided by the appropriations measure in question; whether it waives current law and affects agency discretion; whether it imposes new duties upon a government official or agency; and whether the funding is provided based upon a contingency.[4] The appropriations contexts in which these restrictions on legislative language apply and how they are enforced are discussed below in the section "House and Senate Procedural Restrictions on Legislative Language."

Authority to Modify Mandatory Spending Programs

As stated in the previous section, mandatory spending is controlled through legislation other than appropriations acts. The controlling legislation may be modified through subsequent acts of Congress. In light of Congress's constitutional power over the purse,[5] the U.S. Supreme Court has recognized that "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."[6] Where Congress has done so, "an agency is not free simply to disregard statutory responsibilities."[7] If an enacted statute prohibits appropriated funds from being used for specified purposes, the relevant funds are generally unavailable to be obligated or expended for those purposes.[8] As the U.S. Government Accountability Office ("GAO") has noted in its treatise on federal appropriations

[2] For further information on the congressional distinction between authorizations and appropriations, *see* CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, by Jessica Tollestrup and Brian T. Yeh.

[3] For further information on discretionary spending, *see* CRS Report R42388, *The Congressional Appropriations Process: An Introduction*, by Jessica Tollestrup. For further information on appropriated mandatory spending, *see* CRS Report RS20129, *Entitlements and Appropriated Entitlements in the Federal Budget Process*, by Bill Heniff, Jr.

[4] These principles are discussed in detail in CRS Report R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues*, by Jessica Tollestrup.

[5] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

[6] Lincoln v. Vigil, 508 U.S. 182, 192-93 (1993) (upholding the decision to discontinue the Indian Children's Program by the Indian Health Service, where funding for the program was provided in an annual lump sum appropriation to the agency).

[7] *Id.*

[8] 31 U.S.C. § 1301(a) ("Appropriations shall be applied *only* to the objects for which the appropriations were made except as otherwise provided by law.") (emphasis added).

law (commonly known as "the Red Book"),[9] the key question is generally not one of whether Congress has the power to change the law, but whether the language and effect of a particular provision is sufficiently clear:

> Congress is free to amend or repeal prior legislation as long as it does so directly and explicitly and does not violate the Constitution. It is also possible for one statute to implicitly amend or repeal a prior statute, but it is firmly established that "repeal by implication" is disfavored, and statutes will be construed to avoid this result whenever reasonably possible.[10]

Assuming that such a provision is explicit or clear in its intent, the legal effect of including such amendments or repeals in an annual appropriations vehicle has also been addressed by GAO in the Red Book:

> Congress can and does "legislate" in appropriation acts. … It may well be that the device is "unusual and frowned upon."... It also may well be that the appropriation act will be narrowly construed when it is in apparent conflict with authorizing legislation. ... Nevertheless, appropriation acts are, like any other statute, passed by both Houses of Congress and either signed by the President or enacted over a presidential veto. As such, and subject of course to constitutional strictures, they are "just as effective a way to legislate as are ordinary bills relating to a particular subject."[11]

This analysis would not appear to vary based on whether the legislative vehicle is a regular appropriations law, an omnibus appropriations law, a CR covering part of a fiscal year, or any other law that is passed by both houses of Congress and signed by the President. However, inclusion of a "legislative" provision in an appropriations act may require distinct drafting considerations, depending on the desired effect. For example, because annual appropriations acts (including CRs) are made for a particular fiscal year or other fixed time period, it is generally presumed that provisions contained in those acts are effective only for the fiscal year or time period covered. This presumption can be defeated if the provision uses "words of futurity" or if the provision is of a general character bearing no relation to the object of the appropriation.[12] Common "words of futurity" include "hereafter," "henceforth," or "after the date of approval of this Act."[13]

House and Senate Procedural Restrictions on Legislative Language

While both the House and Senate have procedural rules that restrict legislative language, these restrictions apply in different circumstances.

In the House, clauses 2(b) and (c) of Rule XXI prohibit the inclusion of legislative language in general appropriations bills and amendments thereto.[14] Clause 5 of House Rule XXII also prohibits legislative language in conference reports for general appropriations bills.

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[9] The Red Book is a multi-volume publication written by appropriations attorneys at GAO to provide a "basic reference work covering those areas of law in which the Comptroller General renders decisions." GAO, 1 *Principles of Federal Appropriations Law* i (2004).

[10] *Id.* at 2-43. In special cases, the amendment or repeal of a vested entitlement may place some limits on Congress's authority to restrict federal funds. *See* CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, by Jessica Tollestrup and Brian T. Yeh, at 10-11.

[11] GAO, 1 *Principles of Federal Appropriations Law* 2-45 (internal citations omitted).

[12] *Id.* at 2-34.

[13] *Id.* at 2-35. If the provision bears no direct relationship to the appropriation act in which it appears, this may also be taken as an indication that Congress intended the provision to be permanent. *Id.* at 2-38 (citing B-214508, Feb. 1, 1984, *available at* http://www.gao.gov/products/B-214058).

[14] *See House Manual* at § 1044. In the House, this prohibition also includes motions to recommit general appropriations measures with instructions containing legislative language.

In contrast, while paragraphs 2 and 4 of Senate Rule XVI generally prohibit the inclusion of legislative language in committee or floor amendments to general appropriations bills,[15] the rule also includes exceptions that would allow legislative language under certain circumstances. Specifically, legislative amendments are allowed when they are determined to be germane to legislative language passed by the House and are already contained in the appropriations bill. If a point of order is raised against an amendment based on its including legislative language, the proponent may counter by raising a "defense of germaneness." That is, the proponent may ask for a decision of the Senate to allow the amendment notwithstanding the legislative language, because it is germane to legislative language already in the bill. If a germaneness defense is raised for an amendment, the presiding officer makes an initial "threshold" determination as to whether there exists "any House language which is arguabl[y] legislative to which the amendment at issue conceivably could be germane."[16] If the bill is determined to contain such language, the question is put to the Senate for an immediate vote, so that if a majority of Senators affirms that the amendment is germane, the point of order falls, and the amendment containing legislation is eligible for floor consideration. There is one significant modification to the procedures just described if the Senate amendment is to a House-passed bill containing continuing appropriations or to a CR. Under a Senate precedent, if the defense of germaneness is raised for an amendment, the presiding officer submits the question directly to the Senate without first making any threshold determination.[17]

In addition to prohibiting legislative language in different circumstances, the precedents associated with House Rule XXI and Senate Rule XVI also use different definitions for what constitutes a "general appropriations bill." In the House, general appropriations bills are the annual appropriations acts (or any combination thereof, including omnibus appropriations acts) and any supplemental appropriations acts that cover more than one agency. CRs are not considered to be general appropriations bills.[18] In the Senate, "general appropriations bills" are the annual appropriations measures (or any combination thereof, including omnibus appropriations acts) and any supplemental or continuing appropriations measure that covers more than one agency or purpose.[19] As a consequence of these definitions, the House may consider and pass a CR containing legislative language, and the Senate may take up a House-passed CR and consider germane amendments, without violating the respective rules of either chamber.

On this and other matters, the rules of the House and Senate are not self-enforcing. A Member must raise a point of order during consideration of the measure or amendment to trigger the procedures described above.[20] In addition, the House may waive clause 2(b) and (c) of Rule XXI through the adoption of a special rule, unanimous consent, or suspension of the rules.[21] The Senate, likewise, may waive paragraphs (2) and (4) of Rule XVI through unanimous consent or suspension of the rules.[22]

The House and Senate parliamentarians are the advisers to the presiding officers for what constitutes legislative language within the appropriations context. This memorandum should not be considered a

[15] *See Riddick's Senate Procedure* at 190. In the Senate, this prohibition on legislative language in amendments includes amendments between the houses.

[16] *Id.* at 167.

[17] *Id*. at 168.

[18] *See House Manual* at § 1044.

[19] *Riddick's Senate Procedure* at 159.

[20] For further information, *see* CRS Report 98-307, *Points of Order, Rulings, and Appeals in the House of Representatives*, by Valerie Heitshusen, and CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

[21] For a discussion of these practices in the context of regular appropriations measures and their historical use, *see* CRS Report R42933, *Regular Appropriations Bills: Terms of Initial Consideration and Amendment in the House, FY1996-FY2013*, by Jessica Tollestrup.

[22] For further information on suspension of the rules for Rule XVI, *see Riddick's Senate Procedure* at 177.

substitute for consultation with the parliamentarian and his or her associates on specific procedural problems and opportunities.

What is the earliest date an interested party can apply for any funding for Title X grants?[23]

The Office of Management and Budget ("OMB") issues guidance to federal agencies administering federal grants. The OMB guidance stipulates that federal awarding agencies must announce specific funding opportunities by providing certain information in a public notice.[24] A Notice of Funding Opportunities ("NOFO") must include the following:

1. A full programmatic description of the funding opportunity;
2. Federal award information, including sufficient information to assist applicants in making an informed decision regarding whether to apply for funding;
3. Specific eligibility information, including factors or priorities affecting an applicant's eligibility for selection of funding;
4. Application preparation and submission information, including submission dates;
5. Application review information, including the criteria and process that will be used to evaluate the applications; and
6. Federal award information, such as the general award information required in the application, general terms and conditions of the grant award, and federal award performance goals.[25]

There are two types of funding agreements awarded for the Title X Family Planning program: new competitive grants and non-competing continuation grants.[26] For the first, applicants must apply electronically through Grants.gov in response to a NOFO. [27] NOFOs are usually posted on Grants.gov and on the website for the Department of Health and Human Service's ("HHS") Office of Population Affairs ("OPA"). When the actual amount of funding available for projects is not yet determined, federal agencies may issue an Announcement of Anticipated Availability of Funds ("AAAF"). The AAAF contains generally the same information as the NOFO, but will usually include an estimate of funding available under the grant program with a disclaimer that indicates that actual amounts have yet to be determined. For example, on October 23, 2015, HHS posted several Title X AAAFs on Grants.gov, with application

[23] The response to this question was prepared by Natalie Keegan, Analyst in American Federalism and Emergency Management Policy, and Angela Napili, Information Research Specialist.

[24] 2 CFR § 200.203.

[25] *Id*.

[26] For example, a recent Title X Family Planning Services Announcement of Anticipated Availability of Funds states that "[w]e will fund grants in annual increments (budget periods) and generally for a project period of up to 3 years, although we may approve shorter project periods." For a project with a three-year project period, the first-year award is a new grant, while the second- and third-year awards are non-competing continuation grants. HHS, Office of the Assistant Secretary for Health, Office of Population Affairs, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants, Funding Opportunity Number PA-FPH-16-00X*, p. 11, http://www.hhs.gov/opa/pdfs/opa-fy2016-1.pdf. For additional information on the Title X Family Planning program, *see* CRS Report RL 33644, *Title X (Public Health Service Act) Family Planning Program*, by Angela Napili.

[27] Some applicants may request an exemption to submit applications outside of Grants.gov. For example, the FY2016 Title X Family Planning Services NOFO notes: "You must submit electronically via Grants.gov unless you obtain a written exemption from this requirement 2 business days in advance of the deadline from the Director, HHS/OASH [Office of the Assistant Secretary for Health] Office of Grants Management. To obtain an exemption, you must request one via email from the HHS/OASH Office of Grants Management, and provide details as to why you are technologically unable to submit electronically through Grants.gov portal." *See Announcement of Anticipated Availability of Funds for Family Planning Services Grants, Funding Opportunity Number PA-FPH-16-00X*, *supra* note 26 at 2.

due dates as early as January 11, 2016, and project start dates as early as April 1, 2016.[28] The Title X AAAFs included a disclaimer that, "the actual amount available will not be determined until enactment of the FY2016 federal budget."[29] Generally, a federal agency will issue a NOFO following the AAAF once the actual amount of funding has been determined.

Information on non-competing continuation grants is provided in the response to the following question.

What is the earliest date Title X funds can be obligated? At what point in FY2016 will Title X grants be available for award to PPFA or its affiliates?[30]

As of this writing, final full-year appropriations for FY2016 have not yet been enacted. On September 30, 2015, the President signed H.R. 719, Continuing Appropriations Act, 2016 (P.L. 114-53).[31] This temporary CR funds most discretionary programs, including Title X, through December 11, 2015 (or until full-year funding is appropriated, whichever occurs first), at the rate they were funded in the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), minus an across-the-board reduction of 0.2108%. This temporary Title X funding is subject to the same authority and conditions as in FY2015.[32]

Under a CR, new competing grants are generally not awarded. Temporary CRs, including the current CR, typically contain provisions that restrict grants from being awarded for "those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of the [fiscal year] because of distributions of funding to States, foreign countries, grantees, or others[.]"[33] When the federal government operates under a temporary CR, grants are executed once annual funding becomes available, either through annual appropriations laws or a full year CR. This occurs because the federal agency has to enter into a contract (a grant agreement) with the grantee that stipulates the amount of funding provided, and the agency will not know the total amount of grant funds available to award until full year appropriations are made. Given that the federal government is currently operating under a CR, CRS cannot determine when new grant awards will be made. The timing of such awards will depend on various factors, such as grant application deadlines, the time it takes to process and evaluate grant applications, and the workloads of HHS regional office staff who administer grants and allocate funds.[34]

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[28] *See, e.g.*, Dept. of Health and Human Services, Office of the Assistant Secretary for Health, Office of Population Affairs, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants - Virginia (entire State), Funding Opportunity Number* PA-FPH-16-007 (Oct. 23, 2015), http://www.grants.gov/web/grants/view-opportunity.html?oppId=279784.

[29] Dept. of Health and Human Services, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants*, PA-FPH-16-007, http://www.grants.gov/web/grants/search-grants.html?keywords=Title%20X.

[30] The response to this question was prepared by Elayne J. Heisler, Specialist in Health Services, and Angela Napili, Information Research Specialist.

[31] For additional information on H.R. 719, *see* CRS Report R44214, *Overview of the FY2016 Continuing Resolution (H.R. 719)*, by Jessica Tollstrup.

[32] The FY2015 Consolidated and Further Continuing Appropriations Act (P.L. 113-235) appropriated $286.479 million for Title X for FY2015. The FY2015 act continued previous years' requirements that Title X funds not be spent on abortions, all pregnancy counseling be nondirective, and funds not be spent on "any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office." Grantees continued to be required to certify that they encourage "family participation" when minors decide to seek family planning services, and that they counsel minors on how to resist attempted coercion into sexual activity. The law also clarified that family planning providers are not exempt from state notification and reporting laws on child abuse, child molestation, sexual abuse, rape, or incest.

[33] *See, e.g.*, P.L. 114-53, 114th Cong. § 109 (2015). For additional information on continuing resolutions, *see* CRS Report R42647, *Continuing Resolutions: Overview of Components and Recent Practices*, by Jessica Tollstrup.

[34] For a discussion of Title X funding cycles, *see* Institute of Medicine, "Funding cycles," in *A Review of the HHS Family Planning Program: Mission, Management, and Measurement of Results*, ed. Adrienne Stith Butler and Ellen Wright Clayton (Washington: The National Academies Press, 2009) 371-73, http://www.nap.edu/catalog.php?record_id=12585.

With regard to non-competing Title X continuation funds, it is not clear whether these funds have been released for FY2016. CRS has contacted HHS for further information, but has not yet received a response. HHS has awarded non-competing continuation funds when it has operated under a CR in previous years.[35] While operating under a CR in prior years, HHS has also made revisions to previously awarded Title X grants.[36] In addition, in prior years, during the period covered by a CR, Title X grantees, such as a state health agency, have made sub-grants to delegate agencies and clinics.[37]

Can Congress include provisions that prohibit the use of funds to award Title X grants in a CR or omnibus appropriations act?[38]

If Congress desires to provide no funding for Title X grants in a CR or omnibus appropriations act, this could be accomplished by omitting the appropriation for that purpose. Alternatively, a provision could be included in the measure that prohibits the use of funds for the purpose of awarding Title X grants. Although House and Senate rules discussed above restrict legislating on appropriations, prohibitions on the use of funds for certain purposes may be included in general appropriations measures through limitation provisions. Specifically, limitation provisions negatively restrict the amount, purpose, or availability of funds without changing existing law. The effect of these provisions is to limit the actions for which funds may be used through the capping or outright denial of funds for specific purposes. Proper limitations are distinct from legislative provisions, because they do not have the effect of either making new law or changing existing law. As a result, limitation provisions, which define the purposes for which budget authority may not be used without also affecting a recipient's discretion under other laws, have frequently been included within the text of appropriations bills reported by the committee or added by amendments on the floor. Limitations are allowable under the rules of the House and Senate under the principle that while Congress may authorize an activity, it is under no obligation to fund it. Congress can therefore choose to specify those purposes for which funds are not to be used, even if those purposes have been previously authorized.[39]

A restriction on the use of funds to award Title X grants that was drafted as a proper limitation in an omnibus appropriations measure or CR generally would be allowable under the rules of the House and Senate. If such a provision were drafted so as to be legislative in nature, it would be subject to the restrictions described above in the section titled, "House and Senate Procedural Restrictions on Legislative Language." However, if enacted into law notwithstanding these procedural restrictions,

[35] For example, on November 27, 2013, while the federal government was operating under a CR (Continuing Appropriations Act, 2014, P.L. 113-46), HHS obligated $258,500 in continuation funds to Planned Parenthood of Arkansas and Eastern Oklahoma. *See* USAspending.gov, *Transaction Details, Planned Parenthood of AR & East OK* FPHPA066059, http://1.usa.gov/1OFztS4.

[36] For example, on November 25, 2014, while operating under a CR (Continuing Appropriations Resolution, 2015, P.L. 113-164), HHS made a revision to a previous Title X grant award that resulted in $7,979 in funding to the Iowa Department of Public Health. *See* USAspending.gov, *Transaction Details, IA State Department of Public Health FPHPA076132* , http://1.usa.gov/1Nbmqq1. Revisions can be upward or downward adjustments to previous awards due to cost revisions, corrections, or award cancellations.

[37] Title X grantees can provide family planning services directly or they can delegate Title X monies to other agencies to provide services. For example, on October 1, 2014, while the federal government was operating under a CR (Continuing Appropriations Resolution, 2015, P.L. 113-164), the Michigan Department of Community Health, a Title X grantee, awarded a $146,400 sub-grant to Planned Parenthood of Mid- and South Michigan to provide Title X HIV Integration services. *See* USAspending.gov, *Transaction Details, Planned Parenthood of Mid- and South Michigan 20150147*, http://1.usa.gov/1k2Ppmi. The timing of sub-grants may depend on the grantee's own budget cycle and administrative processes, and might not always match federal funding cycles.

[38] The response to this question was prepared by Edward C. Liu, Legislative Attorney, and Jessica Tollestrup, Specialist on Congress and the Legislative Process.

[39] Lewis Deschler, *Deschler's Precedents of the U.S. House of Representatives*, 94th Cong., 1st sess., H.Doc. 94-661 (Washington: GPO, 1977-1991), vol. 8, chapter 26, § 64.

whether the provision was part of an appropriations vehicle is largely no longer relevant, except with regard to questions about the duration of the provision, as discussed above.[40]

What reporting is required (if any) for a Federally Qualified Health Center ("FQHC") that would like to offer abortion services?[41]

FQHCs are entities that are certified by the Centers for Medicare and Medicaid Services, and receive grants authorized under section 330 of the Public Health Service Act ("PHSA") from the Federal Health Center Program.[42] FQHC certification enables health centers to receive a generally higher reimbursement rate for services provided to beneficiaries enrolled in Medicare and Medicaid. The term "FQHC" is generally used interchangeably with "health center" or "community health center." A community health center is the most common type of health center funded by the Federal Health Center Program. The Federal Health Center Program also funds health centers for the homeless, health centers for residents of public housing, and migrant health centers, each of which serve a more targeted population than do community health centers, which serve a generally underserved population. The Federal Health Center Program is administered by the Health Resources and Services Administration ("HRSA") within HHS.

The Federal Health Center Program requires that its grantees report certain information to HRSA's Uniform Data System ("UDS"), such as patient demographics, services provided, staffing information, utilization rates, costs, and revenue. HRSA compiles UDS data and releases these data annually. The most recent report presents 2014 data (note that these data are by calendar year and not federal fiscal year).[43]

FQHCs are required to offer certain primary care and supportive services. They may add additional services if they have funds to do so, but a determination of what services to offer must be made in consultation with the governing boards of the FQHCs.[44] Additional services are intended to support the needs of the community that the FQHC serves.

Were an FQHC to obtain the approval of its governing board and begin to offer abortion services, several conditions would probably have to be met. First, the FQHC would likely have to comply with state and local laws that govern how abortion services are provided.[45] Second, these services could not be provided with federal funds, except under limited circumstances.[46] As such, an FQHC would need to have alternative resources (e.g., patient fees) available for both the start-up and continuation of abortion services. Third, the FQHC would have to ensure that its accounting systems can document that only non-federal funds are being used to provide abortion services.

Do any FQHCs currently perform abortions?[47]

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[40] *See supra* at notes 11-12 (discussing use of "words of futurity" to indicate permanence).

[41] The response to this question was prepared by Elayne J. Heisler, Specialist in Health Services.

[42] *See* Appendix B of CRS Report R43937, *Federal Health Centers: An Overview*, by Elayne J. Heisler.

[43] HRSA, Uniform Data System (UDS) Report, UDS, National Program Grantee Data, 2014, http://bphc.hrsa.gov/uds/datacenter.aspx.

[44] *See* "Health Services" and "Governance Requirements" sections in CRS Report R43937, *Federal Health Centers: An Overview*, by Elayne J. Heisler.

[45] *See, e.g.*, Tex. Health & Safety Code Ann. § 245.010(a) ("On and after September 1, 2014, the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers."). For additional information on other state abortion requirements, *see* CRS Report. R44205, *Abortion, Hospital Admitting Privileges, and Whole Woman's Health v. Cole*, by Jon O. Shimabukuro. In some cases, an FQHC would likely have to hire additional staff or make other changes to comply with the relevant requirements.

[46] *See, e.g.*, 42 C.F.R. § 50.303 ("Federal financial participation is not available for the performance of an abortion in programs or projects to which this subpart applies except under circumstances described in § 50.304 ["Life of the mother would be endangered"] or § 50.306 ["Rape and incest"]").

[47] The response to this question was prepared by Elayne J. Heisler, Specialist in Health Services.

According to the National Association of Community Health Centers ("NACHC"), an advocacy organization that represents community health centers, no health center currently performs abortions.[48] The NACHC emphasized that health centers that add services – beyond those required by the terms of their Federal Health Center Program grants – must do so after consulting with their advisory boards and must represent the needs of the communities they serve .[49] According to the NACHC, providing abortion services would not be in line with the mission of health centers to provide primary care.

CRS has also contacted HRSA with this question, but has not yet received a response.

Does Planned Parenthood receive discretionary funding through contracts or other programs administered by (or funded through) the Department of Health and Human Services, Department of Housing and Urban Development, Department of Justice, Department of Agriculture, or any other federal agency? If so, provide a list of the programs and the amount of funding appropriated in FY15.[50]

In the past, PPFA has received funding from mandatory and discretionary programs from a number of federal departments and agencies. CRS is unable to identify definitively all of the departments and agencies that provided funding to PPFA in FY2015. CRS can, however, provide some information on past funding sources based on a March 2015 report released by GAO, which details federal funding to PPFA for FY2010-FY2012.[51] The report appears to represent the most complete information available on federal funding to PPFA and its affiliates.

Specifically, GAO found that a mandatory program, Medicaid, is the largest source of government funding, with PPFA affiliates reporting $400.56 million in Medicaid reimbursements in FY2012.[52] Each state's Medicaid program is jointly financed by the state and the federal government, and GAO does not distinguish the federal from the state share (i.e., the $400.56 million reported by GAO includes expenditures of both federal and state funds). According to the GAO report, in FY2012, PPFA affiliates also reported reimbursements from Medicare ($0.58 million) and the State Children's Health Insurance Program ("CHIP") ($0.15 million).[53] Medicare is federally funded, while CHIP is funded by both federal and state governments. Medicaid, Medicare, and CHIP are all administered at the federal level by HHS. [54] In addition to reimbursements from these programs, GAO also reported that PPFA has expended or obligated funds from three other mandatory programs: [55] Social Services Block Grants, administered by HHS (CFDA 93.667);[56] Crime Victim Assistance, administered by the U.S. Department of Justice (CFDA

[48] Communication with Amy Simmons, Communications Director, Nat'l Assn. of Community Health Centers (Sept. 16, 2015).

[49] *See* "Governance Requirements" section in CRS Report R43937, *Federal Health Centers: An Overview*, by Elayne J. Heisler.

[50] The response to this question was prepared by Elayne J. Heisler, Specialist in Health Services, and Angela Napili, Information Research Specialist.

[51] GAO, *Health Care Funding: Federal Obligations to and Expenditures by Selected Entities Involved in Health-Related Activities, 2010–2012*, GAO-15-270R (Mar. 20, 2015), http://www.gao.gov/products/GAO-15-270R.

[52] *Id*. at 41 (Table 26).

[53] *Id*.

[54] For more information on these programs, *see* CRS Report R43357, *Medicaid: An Overview*, by Alison Mitchell et al.; CRS Report R40425, *Medicare Primer*, by Patricia A. Davis et al.; CRS Report R43627, *State Children's Health Insurance Program: An Overview*, by Evelyne P. Baumrucker and Alison Mitchell; and CRS Report R43949, *Federal Financing for the State Children's Health Insurance Program (CHIP)*, by Alison Mitchell. Federal CHIP funding is mandatory spending. Medicare is primarily financed through mandatory spending; Medicare benefit spending is mandatory, while some administrative costs are discretionary.

[55] GAO, *supra* note 51 at 39 (Table 24).

[56] For additional information on this program, *see* CRS Report 94-953, *Social Services Block Grant: Background and Funding*, by Karen E. Lynch.

16.575);[57] and the Personal Responsibility and Education Program, administered by HHS (CFDA 93.092).[58]

In Tables 24 and 25 of the 2015 report, GAO analyzed single audits and financial data obtained directly from the relevant organizations and found that PPFA affiliates expended funds from programs administered by HHS (in addition to the mandatory programs mentioned above), the Department of Housing and Urban Development, the Department of Justice, and the Department of Agriculture. PPFA may have received these funds directly from federal agencies or indirectly as sub-awards passed through state agencies or other federal grantees. GAO did not identify a total amount of federal funding in any fiscal year, in part, because GAO used data from a number of sources, including PPFA and individual PPFA affiliate revenue reports. These reports are based on the PPFA entities' fiscal years, which differ from the federal fiscal year.

Table 1 lists the discretionary programs for which PPFA affiliates reported expenditures of federal funds in FY2012, according to GAO.[59] The table also includes the FY2015 appropriation for the entire program; CRS did not determine how much, if any, of this appropriation was allocated to PPFA affiliates in FY2015. CRS does not have information that indicates whether the programs that funded PPFA affiliates in FY2012 are still providing funds to PPFA affiliates in FY2015. For example, a number of the federal programs noted in Table 1 are competitive grant programs. A competitive grant that was active in FY2012 may have ended subsequently; a PPFA affiliate may have chosen not to apply for a particular program; or a PPFA affiliate may not have competed successfully for funds. Furthermore, a number of programs from which PPFA affiliates received funds in FY2012 were block grants to states (e.g., Maternal and Child Health Services Block Grant). A state may choose not to contract with PPFA for a particular service, choosing to use a different entity to provide that service. CRS does not have data on the extent to which situations such as these have occurred since FY2012.

Table 1. FY2015 Appropriations for Discretionary Programs for which PPFA Affiliates Reported Expenditures of Federal Funds in FY2012

Program and Catalog of Federal Domestic Assistance ("CFDA") Number	FY2015 Appropriations
U.S. Department of Health and Human Services	
Title X Family Planning Services (93.217)	$286.479 million[a]
Maternal and child health services block grant to the states (93.994)	$637.000 million[b]
Teenage pregnancy prevention program (93.297)	$107.800 million[c]
CDC 318 federal grant[d]	$157.310 million[e]
U.S. Department of Housing and Urban Development (HUD)	
Housing opportunities for persons with AIDS (14.241)	$330.000 million[f]

[57] For additional information on this program, *see* CRS Report R42672, *The Crime Victims Fund: Federal Support for Victims of Crime*, by Lisa N. Sacco.

[58] GAO, *supra* note 51 at 30 (Table 15). For more information on this program, see CRS Report RS20301, *Teenage Pregnancy Prevention: Statistics and Programs*, by Carmen Solomon-Fears.

[59] Additional questions about the GAO report and/or its methodology may be directed to Marcia G. Crosse, (202) 512-7114, crossem@gao.gov. To request an update of the report by GAO to include more recent fiscal years, please contact GAO's Office of Congressional Relations (congrel@gao.gov, 202-512-4400) or *see* GAO, *Requesting Work*, http://watchdog.gao.gov/requesting-work/.

Program and Catalog of Federal Domestic Assistance ("CFDA") Number	FY2015 Appropriations
Community development block grants/entitlement grants (14.218)	$3,066.000 million[g]
U.S. Department of Justice (DOJ)	
Violence against women formula grants (16.588)	$195.000 million[h]
U.S. Department of Agriculture (USDA)	
Special supplemental food program for women, infants, and children (10.557)	$6,623.000 million[i]
Women, infant, and children farmer's market nutrition program (10.572)	$16.548 million[j]

Source: The list of programs in this table is based on the programs included in *Health Care Funding: Federal Obligations to and Expenditures by Selected Entities Involved in Health-Related Activities, 2010–2012*, GAO-15-270R (Mar. 20, 2015), Tables 24 and 25, http://www.gao.gov/products/GAO-15-270R. FY2015 appropriations amounts: CRS reports and sources cited in table notes below.

Notes: The GAO report (Table 25) also notes that PPFA affiliates expended funds from "Other federal grants" and that they received federal reimbursements from "Cervical and breast cancer screenings," with no CFDA number. The GAO report (Table 24) also noted that PPFA affiliates expended funds from a USDA "Buildings and facilities program" (CFDA 10.218), but CRS did not identify an FY2015 appropriations amount because this program is no longer listed in the Catalog of Federal Domestic Assistance and it is not clear whether another program has replaced it. These programs are not reflected in the above table.

a. Includes funds for all three Title X Family Planning programs: Family Planning Services (CFDA 93.217), Family Planning Personnel Training (CFDA 93.260) and Family Planning Service Delivery Improvement Research Grants (CFDA 93.974). For more information on Title X, *see* CRS Report RL33644, *Title X (Public Health Service Act) Family Planning Program*, by Angela Napili.

b. For more information on this program, *see* CRS Report R42428, *The Maternal and Child Health Services Block Grant: Background and Funding*, by Carmen Solomon-Fears, and HRSA, *Fiscal Year 2016 Justification of Estimates for Appropriations Committees,* p. 206, http://www.hrsa.gov/about/budget/budgetjustification2016.pdf.

c. Includes $6.800 million for program evaluation. For more information on this program, *see* CRS Report RS20301, *Teenage Pregnancy Prevention: Statistics and Programs*, by Carmen Solomon-Fears.

d. The GAO report does not specify a CFDA number, but notes that "[t]he CDC 318 federal grants are for activities related to the treatment of sexually transmitted diseases that can result in infertility if treatment is not received."

e. Funding for Centers for Disease Control and Prevention's Sexually Transmitted Infections activities. See Centers for Disease Control and Prevention, *Fiscal Year 2016 Justification of Estimates for Appropriations Committees*, p. 92, http://www.cdc.gov/injury/pdfs/budget/cdc_cj_final_fy2016.pdf.

f. For more information on this program, *see* CRS Report RL34318, *Housing for Persons Living with HIV/AIDS*, by Libby Perl.

g. Includes funding for Community Development Block Grants/Entitlement Grants (CFDA 14.218), Community Development Block Grants/State's program and Non-Entitlement Grants in Hawaii (CFDA 14.228), Indian Community Development Block Grant Program (CFDA 14.862), and Community Development Block Grants/Special Purpose Grants/Insular Areas (CFDA 14.225). For more information on these programs, *see* CRS Report R43520, *Community Development Block Grants and Related Programs: A Primer*, by Eugene Boyd, and CRS Report R43548, *Department of Housing and Urban Development: FY2015 Appropriations*, by Libby Perl et al.

h. This CFDA program is also known as STOP (Services, Training, Officers, and Prosecutors) Violence Against Women Formula Grants. For more information on this and other Violence Against Women Act programs, *see* CRS Report R42499, *The Violence Against Women Act: Overview, Legislation, and Federal Funding*, by Lisa N. Sacco

i. For more information on this program, *see* CRS Report R44115, *A Primer on WIC: The Special Supplemental Nutrition Program for Women, Infants, and Children*, by Randy Alison Aussenberg.

j. For more information on this program, *see* CRS Report R44115, *A Primer on WIC: The Special Supplemental Nutrition Program for Women, Infants, and Children*, by Randy Alison Aussenberg, and U.S. Dept. of Agriculture, Food and Nutrition Service, *FY2016 Budget Explanatory Notes*, p. 32-130 http://www.obpa.usda.gov/32fns2016notes.pdf.

For details on the dollar amounts that PPFA affiliates reported expending for the above programs, please see Tables 24 and 25 in the GAO report. The GAO report has three additional tables that list HHS programs that obligated or disbursed funds to PPFA affiliates, or that provided reimbursements to PPFA for services provided:

- Table 15 lists the programs for which HHS obligated the most funding to PPFA affiliates in FY2012. GAO noted that an obligation is "a definite commitment by a federal agency that creates a legal liability to make payments immediately or in the future." These programs were: Title X Family Planning Service Delivery Improvement Grants (CFDA 93.974),[60] the Teenage Pregnancy Prevention Program (CFDA 93.297),[61] and the Personal Responsibility Education Program (CFDA 93.092). The last program is mandatory.[62]
- Table 16 lists the programs for which HHS disbursed the most funding to PPFA affiliates in FY2012. GAO noted that disbursements are "amounts paid by federal agencies, in cash or cash equivalents, to satisfy government obligations." These programs were the Title X Family Planning Service Delivery Improvement Grants (CFDA 93.974),[63] the Teenage Pregnancy Prevention Program (CFDA 93.297),[64] and HIV Prevention Activities – Nongovernmental Organization-Based (CFDA 93.939).[65] All three of these programs are discretionary programs.
- Table 26 lists information on CHIP (CFDA 93.767), Medicaid (CFDA 93.778), and Medicare (CFDA 93.774) reimbursements to PPFA affiliates. GAO noted that amounts in this table overestimate federal reimbursements because they include both federal and state payments for services.

Can Congress prohibit HHS, HUD, DOJ, and DOA from awarding grants to Planned Parenthood or its affiliates?[66]

Legislation that would prohibit the receipt of federal funds by a specific organization or group might arguably be challenged under the Bill of Attainder Clause of the U.S. Constitution.[67] In *Nixon v. Administrator of General Services*, the U.S. Supreme Court described a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[68] A bill of attainder is characterized generally by three elements:

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[60] FY2015 appropriations for Title X Family Planning appear in Table 1. For more information on Title X, *see* CRS Report RL33644, *Title X (Public Health Service Act) Family Planning Program*, by Angela Napili. Funding for these programs is discretionary.

[61] FY2015 appropriations for the Teenage Pregnancy Prevention appear in Table 1. For more information on this program, *see* CRS Report RS20301, *Teenage Pregnancy Prevention: Statistics and Programs*, by Carmen Solomon-Fears. Funding for this program is discretionary.

[62] FY2015 appropriations for the Personal Responsibility Education Program were $75.000 million. Funding for this program is mandatory. For more information on this program, *see* CRS Report RS20301, *Teenage Pregnancy Prevention: Statistics and Programs*, by Carmen Solomon-Fears.

[63] *See* note 60.

[64] *See* note 61.

[65] FY2015 appropriations for the Centers for Disease Control and Prevention's Domestic HIV/AIDS Prevention and Research activities, including this CFDA program among others, totaled $786.712 million. For more information, *see* Centers for Disease Control and Prevention's *Fiscal Year 2016 Justification of Estimates for Appropriations Committees*, p. 70, http://www.cdc.gov/injury/pdfs/budget/cdc_cj_final_fy2016.pdf.

[66] The response to this question was prepared by Jon O. Shimabukuro, Legislative Attorney.

[67] U.S. Const. art. I, § 9, cl. 3.

[68] 433 U.S. 425, 468 (1977).

specificity or the singling out of an individual or identifiable group for punishment; punishment inflicted by some authority other than a judicial authority; and the lack of a judicial trial.[69] In determining whether a statute has the requisite specificity to be considered a bill of attainder, the Court has found that if an otherwise identifiable group has the opportunity to avoid the so-called punishment, the element of specificity is not satisfied.

In *Selective Service System v. Minnesota Public Interest Research Group*, the Court considered whether a section of the Military Selective Service Act ("MSSA") was a bill of attainder.[70] Section 12(f)(1) of the MSSA provides that any person who is required to register for the draft and fails to do so will be ineligible for financial assistance under the Higher Education Act.[71] Although section 12(f)(1) would seem to single out nonregistrants, the Court concluded that the section was not a bill of attainder, in part, because its requirements could be met by timely or late filing. The Court distinguished section 12(f)(1) from other statutes found to be bills of attainder that prohibited entry by certain individuals into specified professions because of their past conduct. Unlike the nonregistrants who could avoid punishment by registering, these groups of individuals could not absolve themselves of their past conduct and gain entry into the professions.

Under at least some of the bills introduced in the 114th Congress that would restrict the availability of federal funds to PPFA or its affiliates, it seems possible for an organization to similarly avoid punishment. S. 1917, for example, would restrict the availability of federal funds to any affiliate, subsidiary, successor, or clinic of PPFA that "receives compensation for facilitating the donation of fetal tissue products derived from an abortion."[72] It seems that an organization could avoid punishment by either not receiving compensation for facilitating the donation of fetal tissue products, or by not participating in the transfer of fetal tissue products entirely.

Nevertheless, even if the element of specificity were satisfied, it is not entirely certain that restricting the availability of federal funds would satisfy the second element of a nonjudicial infliction of punishment. In *Selective Service System*, the Court indicated that it considers three factors to determine whether a statute inflicts forbidden punishment: whether the challenged statute falls within the historical meaning of legislative punishment; whether the statute can be said to further nonpunitive legislative purposes; and whether the legislative record evinces a congressional intent to punish.[73] All three factors do not need to be satisfied; rather, the elements are weighed together to resolve a bill of attainder claim.

After considering the punishment inflicted by other bills of attainder, the *Selective Service System* Court noted that the possible denial of federal financial aid is unlike the punishment that had been contemplated by those statutes. The Court observed: "A statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of forbidden legislative punishment."[74] Like section 12(f)(1) of the MMSA, S. 1917 would seem to place organizations that are associated with PPFA in a similar position; that is, the parties would be able to maintain or receive federal funds if they declined compensation for facilitating the donation of fetal tissue products derived from an abortion, or chose not to participate in the procurement of such products.

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[69] *See* ACORN v. United States, 618 F.3d 125, 135-42 (2d Cir. 2010) (discussing the elements of an unconstitutional bill of attainder, and finding that an appropriations measure that declared ACORN and its affiliates ineligible to receive appropriated funds did not constitute a bill of attainder).

[70] 468 U.S. 841 (1984).

[71] 50 App. U.S.C. § 462(f)(1).

[72] S. 1917, 114th Cong. § 1(a) (2015).

[73] *Selective Service System*, 468 U.S. at 852.

[74] *Id*. at 853.

H.R. 3134, the Defund Planned Parenthood Act of 2015, which was passed by the House on September 18, 2015, would restrict the availability of federal funds to PPFA or its affiliates if they perform elective abortions or provide financial assistance to another entity that performs elective abortions. Because federal funds would remain available to PPFA or its affiliates if they choose not to perform elective abortions or provide financial assistance to another entity for the performance of such abortions, it seems possible to argue, in light of *Selective Service System*, that the funding restriction should also not fall within the historical meaning of forbidden legislative punishment.

Consideration and passage of H.R. 3134 by the House has provided a clearer understanding of the bill's purposes and allowed for the development of a legislative record. During debate on the measure, the bill's sponsor, Rep. Diane Black, described the recent videos involving Planned Parenthood employees as the impetus for the bill:

> Well, Madam Speaker, I did watch these videos, and I saw full conversations of Planned Parenthood employees in their own words discussing potentially lawbreaking activities. Congressional investigations are underway, but there are more than enough lingering questions to stop the flow of money – taxpayer dollars – to this abortion giant until our work is complete. For this reason, I have introduced the Defund Planned Parenthood Act of 2015.[75]

Unlike 12(f)(1) of the MMSA, which, according to the Court, "promote[d] compliance with the draft registration requirement and fairness in the allocation of scare federal resources," H.R. 3134 appears to respond to the perceived wrongdoing of PPFA and its affiliates, and, arguably, the organizations' abortion activities:

> Madam Speaker, if there exists even a possibility that Planned Parenthood violated our laws, as I believe they did, then pro-life and pro-choice Members of Congress alike must act to reallocate the funds now so that we are not trying to chase down the taxpayer dollars that already went out the door later on. This is ensuring that our laws are followed, that Americans know how their money is being spent, and that the conscience rights of taxpayers are respected.[76]

As indicated, a reviewing court would likely weigh the legislative record of H.R. 3134 against the historical meaning of legislative punishment to determine whether the funding restriction constitutes a nonjudicial infliction of punishment.

Notably, however, in *ACORN v. United States*, a bill of attainder case involving similar funding restrictions imposed on the Association of Community Organizations for Reform ("ACORN") and its affiliates, subsidiaries, and allied organizations, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") declined to view congressional statements made during consideration of the restrictions as reflecting a clear legislative intent to punish.[77] Ultimately, the Second Circuit found the restrictions not to constitute bills of attainder.

In *ACORN*, the Second Circuit concluded that none of the factors identified by the Court in *Selective Service System* were satisfied. The Consolidated Appropriations Act, 2010, included several provisions that restricted the availability of appropriated funds to ACORN and its affiliates, subsidiaries, and allied organizations.[78] For example, section 418 of the omnibus measure, which appropriated funds for the Departments of Transportation, Housing and Urban Development, and Related Agencies, stated: "None of the funds made available under this Act or any prior Act may be provided to the Association of

[75] 161 Cong. Rec. H6153 (daily ed. Sept. 18, 2015) (statement of Rep. Black).

[76] *Id*.

[77] *See* note 69. For additional information on ACORN v. United States, *see* CRS Rept. R40826, *Bills of Attainder: The Constitutional Implications of Congress Legislating Narrowly*, Kenneth R. Thomas.

[78] P.L. 111-117, 123 Stat. 3034 (2009).

Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations."[79]

The Second Circuit emphasized that the withholding of appropriations does not constitute a traditional form of punishment that should be considered intrinsically punitive.[80] The court noted that a temporary ban on federal assistance for ACORN and its affiliates "is not comparable to congressional acts of punishment such as permanent disqualification from a certain vocation or criminalizing past conduct."[81] Moreover, because ACORN derived only 10 percent of its funding from federal grants, the court reasoned that the direct consequences of the funding restrictions were not so severe as to constitute punishment.[82] Finally, the court contrasted the congressional statements made during consideration of the Consolidated Appropriations Act, 2010, with a legislative trial that led to the enactment of a law denying the accused of a federal salary. The court observed: "[H]ere, the statements by a handful of legislators are insufficient to establish – by themselves – the clearest proof of punitive intent necessary for a bill of attainder."[83]

[79] P.L. 111-117, div. A, tit. IV, § 418, 123 Stat. 3034, 3112 (2009). Similarly restrictive provisions were included in the divisions of the omnibus measure that appropriated funds for the Departments of Commerce, Justice, Science, and Related Agencies, and Military Construction, Department of Veterans Affairs, and Related Agencies.

[80] *ACORN*, 618 F.3d at 137.

[81] *ACORN*, 618 F.3d at 140.

[82] In contrast, PPFA has reported that 41 percent of its revenue is derived from government health services grants and reimbursements. Whether this greater percentage of funding alone would prompt a reviewing court to conclude that a funding restriction constitutes punishment is not certain. *See* PPFA, 2013-2014 Annual Report 20, *available at* https://www.plannedparenthood.org/files/6714/1996/2641/2013-2014_Annual_Report_FINAL_WEB_VERSION.pdf.

[83] *ACORN*, 618 F.3d at 142.