NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

The Bush Administration's Recent Attack on Women's Health

Frequently Asked Questions

The Department of Health and Human Services (HHS) has proposed a damaging new rule—which follows an earlier draft made public several weeks ago—which would significantly undermine patient's access to vital health services and information by greatly expanding existing laws intended to govern the right to refuse to provide abortion care. By failing to provide a definition of abortion consistent with accepted medical standards, the proposed rule leaves the door open for doctors, nurses, insurance plans, hospitals, and nearly any other employee in a health care setting to deny access to most forms of birth control. In addition, HHS expands the scope and reach of existing law by allowing any employee of a health care provider to refuse to treat any individual receiving any service—if doing so would violate his or her moral beliefs—without regard for the needs of patients. The proposed rule will create serious confusion throughout the health care system by failing to even mention existing law that governs the relationship between employees seeking the right to refuse to provide certain services and the health care entities that may seek to provide appropriate services to patients. The proposed regulations raise many concerns and questions about their potential impact on health care providers, on access to essential medical services that women depend upon, and on the federally-funded health care programs that low-income Americans depend on.

What Does The Rule Do?

HHS claims to promulgate this rule under the guise of educating recipients of Department funds about their legal obligations under three nondiscrimination statutes: the Church Amendments[i], the Weldon Amendment[ii], and the Public Health Service Act § 245.[iii] These provisions in law give individuals and institutions the ability to refuse to provide, or prohibit requiring the performance or participation in, abortion or sterilization services. Yet, the rule dramatically expands the scope and reach of these laws in the following ways:

1) **The rule is, at best, unclear as to whether a health care provider could expand these laws beyond abortion care to cover some of the most common forms of birth control**. Under a previously-leaked draft of this rule, HHS provided a definition of abortion that, unlike the accepted scientific and medical definition, included many forms of contraception. In the newly proposed rule, HHS has now left the term "abortion" undefined. Given this administration's promotion of ideology over science, and its silence on the definition of "abortion," the rule may allow doctors, nurses, insurance plans, hospitals, and nearly any one else employed in a health care setting to deny women access to some of the most widely used forms of contraception.

2) **The rule allows any employee of a health care provider to refuse to treat any individual if doing so would violate his or her moral beliefs—without regard to the needs of patients**. The rule contemplates an expansive and inappropriate reading of the Church Amendments that allows an individual to refuse to participate in "any part of a health service or research activity" that he or she finds morally objectionable. Current federal employment law, Title VII, makes it clear that employers are permitted to deny a worker's request for an accommodation of religious practice that would interfere with the functioning of the employer's business, including interference with patients' access to services or information. Particularly when coupled with other overly broad interpretations of the statute (see below), this expansive interpretation would allow a health care provider to refuse to provide treatments—from HIV/AIDS or infertility treatment to end of life care—without regard for the needs of patients.

3) **The rule broadly expands the definition of "assist in the performance" to include tasks that may only have a tangential connection to an objected-to service**. The Church Amendment prohibits discrimination against health care professionals who refuse to perform or *assist in the performance* of abortion services. The rule has redefined "assist in the performance" to extend far and wide with regard to medical services—even to receptionists and schedulers who refuse to refer patients for medically necessary services or to provide patients with medical information and options for *any medical treatment*, not just limited to abortion care.

4) **The rule broadly expands the universe of health care individuals and institutions who may refuse to provide services**. The rule contains an over-arching and inappropriately broad definition of "health care entity" that includes doctors, nurses, insurance plans, pharmacies, and hospitals, and practically any employee of a health care provider.

5) **The rule does not even protect patients in emergency situations**. The rule fails to address employers' obligations in the case of an emergency. At best, this failure will cause confusion among employers. At worst, it could place patients in need of emergency medical care in grave harm.

What Else Is Wrong With The Rule?

Despite the elimination of the controversial language in the leaked draft which defined many common forms of contraception as abortion, the new version of the rule continues to be a threat to access to contraception. HHS appears to "hide the ball" by removing the definition of abortion from the rule. Nonetheless, there remain serious concerns about how a newly-expanded universe of providers under the rule will be permitted to define abortion—and what this will mean for women's access to commonly used forms of contraception.

Second, if implemented, women seeking care at a health care facility that receives direct or indirect funds from HHS may no longer be assured that they will receive information about all of their health care options, including the option of safe and legal abortion care. The rule allows a broad range of health care providers and entities to refuse to even refer for abortion or family planning services—allowing health care providers to deny women information they need to make responsible decisions about their health and lives.

Third, the proposed rule could place health care providers in a precarious position when hiring and managing staff who may seek employment at health care centers and then obstruct access to reproductive health care.

Finally, this rule goes beyond limiting access to birth control and abortion; it allows any employee of a health care provider working in a program that receives HHS funding to refuse to treat any individual receiving any service—if doing so would violate his or her moral beliefs—without regard for the needs of the patients. This broad language could permit a health care professional to discriminate against a patient by refusing to provide treatment to certain individuals, such as a doctor refusing to provide IVF for a lesbian patient, or refusing to fill a number of prescriptions including medications to treat HIV or AIDS, narcotic analgesics, methadone, sleeping aids, sexual aids, or any other therapy that an individual may feel represents behavior that is morally objectionable.

Could Secretary Leavitt Revise The Rule To Make It Acceptable?

The rule is a solution looking for a problem and, quite simply, creates problems where none existed. This rule does nothing to clarify existing law and, in fact, will cause confusion and uncertainty among employees, employers and patients regarding their rights surrounding these refusals.

Title VII—which the rule fails to even mention— is the federal law that provides a balance between employers' obligation to accommodate the religious beliefs of their employees and the needs of the people the employer must serve. Under Title VII, employers have a duty to reasonably accommodate an employee or applicant's religious beliefs or practices, when doing so does not place an "undue hardship" on the employer's business. The "undue hardship" defense has allowed an employer to prevent the religious beliefs of its employees from impeding patient's access to health care services.

Importantly, the Equal Employment Opportunity Commission recently released a new section of its compliance manual (http://www.eeoc.gov/policy/docs/religion.html) in an effort to remind employers and employees about these existing rights and responsibilities. The proposed rule's failure to even mention Title VII will likely create confusion throughout the health care industry.

In What Way Might Contraception Be Implicated By The Proposed Rule?

In the earlier leaked rule, HHS defined abortion as being "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 life of a human being in utero between conception and natural birth, *whether before or after implantation.*" This definition—that goes against the long-standing view of medical experts, including the American College of Obstetricians and Gynecologists (ACOG), who agree that pregnancy is established when a fertilized egg has been implanted in the wall of a woman's uterus—implicated commonly used forms of birth control pills, IUDs, and emergency contraception (methods that may act after fertilization to prevent implantation).[iv] The draft language went so far as finding it reasonable "to allow individuals and institutions to adhere to their own views and adopt a definition of abortion that encompasses both views of abortion [whether before or after implantation]."

Now, the proposed rule is ominously silent on the definition of abortion. Given the permissive language in the leaked version on the definition of abortion and this Administration's open contempt for contraceptives and promotion of ideology over science, it is reasonable to conclude that the rule allows health care providers and institutions to refuse some of the most widely viewed forms of contraception, based on their individual view of what constitutes an abortion.

Does This Rule Interfere With State Laws That Protect Women's Access To Reproductive Health Care?

States across the country have passed laws that protect women's access to basic reproductive health care. However, the rule requires entities, including states and local governments, to certify in writing that they will not discriminate against health care providers who refuse to provide abortion services—which as discussed above could include most common forms of birth control. Under the broad language of the rule, hospitals, insurers, health management organizations and other health care entities could claim they are being discriminated against if states attempt to enforce these laws. The question would turn on whether states' enforcement of their own laws is interpreted as "discrimination" under the rule. If so, the rule could undermine laws that:

- require insurance plans that cover other prescription drugs to cover birth control
- ensure rape victims get timely access to and information about emergency contraception
- ensure that pharmacies provide timely access to birth control without discrimination or delay
- ensure that hospital mergers and sales do not deprive communities of needed reproductive health services

How Will HHS Enforce The Rule?

The rule would require entities, including states and local governments, to certify in writing that they will not "discriminate." Noncompliance with the rule could result in HHS de-funding the entity or instituting legal action. The rule is vague as to what constitutes discrimination, and could be interpreted to prevent states from giving funding to entities best qualified to deliver

reproductive health care. The rule could also force states to choose between ignoring their own laws or risk losing the millions of dollars in federal funds they depend on to provide care to their most vulnerable residents. Finally, the certification is bound to cause havoc for health care professionals and institutions that are unclear on how relevant state and federal laws implicate compliance with the rule.

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[i] 42 U.S.C. § 300a-7 (prohibits recipients of federal funds from discriminating against individuals who refuse to provide abortion or sterilization services, and prevents health care professionals and facilities from being required to perform, assist or make available abortion or sterilization services).

[ii] Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (prohibiting federal, state or local government from discriminating against any entity or individual on the basis that the entity or individual refuses to provide, pay for, provide coverage or refer for abortion).

[iii] Public Health Service Act §245, 42 U.S.C. § 238n (prohibits federal, state or local government from discriminating against any entity or individual that refuses to receive or provide abortion training, perform abortions provide abortion referrals or referrals for abortion training).

[iv] Rachel Benson Gold, The Implications of Defining When a Woman is Pregnant, The Guttmacher Report on Public Policy, at 7 (May 2005), available at http://www.guttmacher.org/pubs/tgr/08/2/gr080207.pdf.