THE WHITE HOUSE

WASHINGTON

June 30, 2000

MEMORANDUM FOR HILLARY RODHAM CLINTON

FROM: **HEATHER HOWARD** HH

CC: **MELANNE VERVEER**
SHIRLEY SAGAWA
LISSA MUSCATINE
ANN O'LEARY

SUBJECT: **TITLE X GAG RULE**

I wanted to let you know that the final rule codifying the revocation of the Title X "gag rule" is being made public on June 30th.

BACKGROUND

As you know, in 1993 the President revoked the gag rule, which prevented medical practitioners in Title X family planning clinics from providing abortion information or referrals, even when a woman specifically requested such information. When the President suspended the 1988 gag rule he directed the Secretary of HHS to develop a new rule reinstating pre-1988 policy. The final rule was submitted to OMB for review this winter, and we have been reviewing proposed language.

Instead of merely re-publishing the original pre-1988 rule, many pro-choice groups urged through comment that we make the rule stronger and clearer. Specifically, they recommended moving, from the guidance into the rule, language that defines nondirective counseling and clarifies the right to a referral for an abortion. The groups argued that inclusion of this language in the rule itself is important because 1) they claim that clinics are uncertain about what they can and cannot do and will feel they have more legal protection if the provisions are in the actual rule; and 2) codification would make it harder for a future administration to prevent clinics from providing referrals or to define nondirective counseling in such a way that excludes abortion.

THE FINAL RULE

The final rule being released today reflects these comments. It strengthens Title X policy by clarifying, in the body of the rule rather than the guidance, the requirement that family planning clinics offer patients neutral and nondirective counseling on all of their options: prenatal care and delivery; infant care, foster care or adoption; and pregnancy termination. Consistent with

accepted medical practice, the rule also makes clear that clinics must provide their patients referrals for any of these options, if a patient so requests.

Following is the relevant language:

(a) Projects supported under this rule must

(5) Not provide abortion as a method of family planning.[1] *Each project must offer pregnant women the opportunity to be provided information and counseling regarding:*

(A) prenatal care and delivery;
(B) infant care, foster care or adoption; and
(C) pregnancy termination.

If requested to provide such information and counseling, projects must provide neutral and nondirective counseling, and appropriate referral on request, on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.

We have worked with HHS on a quiet roll-out of the new rule, to minimize provoking a legislative backlash. HHS has briefed the pro-choice community, which is pleased that the Administration has seized this opportunity to strengthen the Title X program.

[1] The Title X program is statutorily prohibited from paying for abortion services.

MAY 12, 2000

MEMORANDUM FOR JOHN PODESTA

FROM: **HEATHER HOWARD**
DOMESTIC POLICY COUNCIL

CC: **BRUCE REED**
MELANNE VERVEER
ANN O'LEARY

SUBJECT: **BACKGROUND MEMO ON THE GAG RULE**

As you know, in 1993 the President revoked the Federal gag rule which prevented medical practitioners in Title X funded facilities from offering women their full set of family planning options, including abortion. Although the lift of the gag rule became effective when the President signed the executive order, the final rule for its revocation was only recently submitted for final review. The pro-choice groups have urged that we release the final rule as quickly as possible so that they have time to prepare for any legislative response. As the Administration finalizes the language of the rule, we are considering a number of options:

Option 1: Clean Revocation – Return to Pre-1988 Rule

The proposed rule published in 1993 was a "clean" revocation of the gag rule and simply a return to the pre-1988 rule. A clean revocation might minimize the likelihood of a legislative response, but the pro-choice groups, after waiting seven years for the final rule, want more: they see this as an opportunity to clarify and strengthen the Title X rules, and they therefore urge the Administration to elevate language from the guidance to the rule. (See Option 2)

You should know that a clean revocation would include language reflecting current law's ban on the use of Title X funds to provide abortions:

> *Projects supported under this rule must not provide abortion as a method of family planning.*

Whichever option we choose would have this language as a base.

Option 2: Option 1 <u>Plus</u> Nondirective Counseling and Referrals Language

The pro-choice community has urged us to make the rule stronger and clearer by bringing in language from the accompanying guidance – essentially codifying part the guidance. Specifically, they have recommended moving language from the guidance into the rule making clear the right to nondirective counseling and referrals. The groups argue that inclusion of this language in the rule itself is important because 1) they claim that clinics are uncertain about what they can and cannot do and will feel they have more legal protection if the provisions are in the actual rule; and 2) codification would make it harder for a future administration to define

nondirective counseling in such a way that excludes abortion or to prevent clinics from giving referrals (because it is easier to change a guidance than a rule).

Language would look like this:

Projects supported under this rule must offer pregnant women the opportunity to be provided information and counseling regarding:

(a) prenatal care and delivery;
(b) infant care, foster care or adoption; and
(c) pregnancy termination.

If requested to provide such information and counseling, projects must provide neutral and nondirective counseling, ***and appropriate referral on request****, on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.* (Emphasis added).

The pro-choice groups believe strongly that defining nondirective counseling and including the right to a referral are important changes to make, even though doing so will raise a red flag. In internal discussions, concern has been expressed that this option will provoke a legislative backlash because although nondirective counseling itself is not controversial, adding the right to a referral is, and will "tip" the balance. Labor-HHS appropriations (or another appropriations bill) would seem the likely vehicle for a legislative response. It remains unclear whether the Republicans will be more inclined to make other abortion issues the focus of the debate this summer and fall (such as "partial birth," the Child Custody Protection Act, and Unborn Victims).

Option 3: "Promote or Encourage"

To provide a balance, if we decide to include the nondirective counseling and referrals language, we could move language from the guidance into the rule further restricting the use of Title X funds. The language would look like this:

Projects supported under this rule must not provide ***or promote or encourage*** *abortion as a method of family planning.* (Emphasis added).

In theory, adding "promote or encourage" would stem potential criticism of expanding the rule to include the nondirective counseling and referral language -- we could argue that we moved all three into the rule because we received significant comment about them. You should know that both Gary Bauer (while at the Family Research Council) and House Republicans wrote during the rule's comment period to request that "promote or encourage" be included in the rule.

Including this language in the actual rule has the effect of highlighting it, and may imply that we believe there has been a problem with Title X clinics promoting or encouraging abortions. In addition, codifying the language may give anti-choice groups a club to harass clinics in litigation. Pro-choice groups oppose inclusion of this language, but it is unclear how strong their opposition is.

Conclusion

In summary, there are several issues we need to address:

1) Does adding nondirective counseling and referrals tip the balance and invite a legislative response?
2) Does adding the "promote or encourage" language help counter that? How upset will the groups be if we add this language?
3) Timing: when should we release the rule?

MAY 12, 2000

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APRIL 3, 2000

MEMORANDUM FOR BRUCE REED

FROM: HEATHER HOWARD

SUBJECT: REVOCATION OF THE GAG RULE

As you know, in 1993 the President revoked the Federal gag rule which prevented medical practitioners in Title X funded facilities from offering women their full set of family planning options, including abortion. Although the lift of the gag rule became effective when the President signed the executive order, the final rule for its revocation has only now been submitted for final review by OMB. The pro-choice groups have recommended that we release the final rule as quickly as possible. As the Administration finalizes the language of the rule, we are considering a number of options:

Option 1: Clean Revocation

The proposed rule published in 1993 was a "clean" revocation of the gag rule and a return to the pre-1988 rule. HHS recommends that the final rule be a clean revocation because they believe that will minimize the likelihood of a legislative response. You should know that this proposal includes language reflecting current law's ban on the use of Title X funds to provide abortions:

> *Projects supported under this rule must not provide abortion as a method of family planning*

This "must not provide abortion" language is a restatement of the pre-1988 rule and was the language proposed in 1993.

Option 2: Option 1 <u>Plus</u> "Nondirective Counseling" Language

The pro-choice community has urged us to make the rule stronger and more detailed by bringing in language from the accompanying guidance. Specifically, they have recommended adding language from the guidance fleshing out the requirements of nondirective counseling. (This would be in addition to the "must not provide abortion" language from Option 1). Proposed language drafted by HHS would state that projects supported under this rule must:

> *Offer pregnant women the opportunity to be provided information and counseling regarding: (a) prenatal care and delivery; (b) infant care, foster care or adoption; and (c) pregnancy termination. If requested to provide such information and counseling, provide neutral and nondirective counseling on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.*

Adding this language from the guidance would strengthen the rule and make it harder for a future administration to define nondirective options counseling in such a way that excludes abortion.

The pro-choice groups believe strongly that defining nondirective counseling is an important change to make, even though it means that the rule is no longer a clean revocation. They recommend that we otherwise stick closely to the pre-gag rule language so as not to engender a Congressional backlash or open it up to a legal challenge. (Thus, they counsel against bringing in other controversial language from the guidance such as language regarding referrals).

Although we can expect a legal challenge regardless of the language, we hope to avoid a serious legislative challenge. (Congressman Bliley has introduced H.R. 2511, the "Adoption Awareness Act," which would promote adoption counseling and redefine nondirective counseling to exclude abortion. This bill, and Labor-HHS appropriations, would seem the likely vehicles for such an attack.) It is worth noting, however, that both Representative Porter and Senator Spector have put a reference to nondirective counseling in the conference reports accompanying their Labor-HHS appropriations bills, and the pro-choice groups believe we would have their support on this. ("Provided further, That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective . . .").

Option 3: "Promote or Encourage"

Another issue that has been raised regards whether we should strictly adhere to the language of the law that prohibits the use of Title X funds for the practice of abortion, or incorporate into the rule interpretive language that more broadly restricts the use of Title X funds, but that has never been part of the rule in the past. In theory, this would stem potential criticism of expanding the rule to include the description of nondirective counseling, as well as reach out to moderates who may otherwise support a legislative challenge to the rule. HHS has drafted the following possible additional language:

> *Projects supported under this rule must not provide* ***or promote or encourage*** *abortion as a method of family planning.*

Although the law clearly states that Title X projects may not provide abortions, only the interpretive guidance and legislative history of the law have extended that meaning to include promotion and encouragement of abortions. By including this language in the actual rule we may alienate members of the pro-choice community by strengthening and giving deeper legitimacy to this interpretation. In addition, moving this language to the rule would highlight it, and may imply that there has been a problem with Title X clinics promoting or encouraging abortions. Also, the pro-choice groups will argue that such language is one-sided in the context of nondirective counseling, and that any "not promote or encourage" language should apply not only to abortion but also to the whole range of counseling options. However, members of the Counsel's office support the inclusion of this language (if the nondirective language is included) for political reasons, because they fear a legislative backlash.

Legislative affairs is not aware that the gag rule is on anyone's radar screen, but they expect that anti-choice members may want to make an issue of it. However, in this political climate, the Republicans may be more inclined to make other abortion issues the focus of the anti-choice debate this summer and fall (such as "partial birth" and the Child Custody Protection Act).

Recommendation

I believe this is an important opportunity to strengthen Title X and recommend Option 2, inclusion of the nondirective counseling language. I have spoken with Ann Lewis and she agrees that we may face a legislative response regardless of the language, and that therefore we should do the right thing (issue a strong rule) and get credit for doing so. I recommend against the addition of "promote or encourage" because 1) it is already in the guidance and adding it to the rule is a step back from the rule proposed in 1993, 2) it is not clear that it would buy us anything, and 3) it will most certainly upset the pro-choice groups.

March 22, 2000

MEMORANDUM FOR ERIC LIU

FROM: HEATHER HOWARD

SUBJECT: REVOCATION OF THE GAG RULE

As you know, in 1993 the President revoked the Federal gag rule which prevented medical practitioners in Title X funded facilities from offering women their full set of family planning options, including abortion. Although the lift of the gag rule became effective when the President signed the executive order, the final rule for its revocation has only now been submitted for final review by OMB. The pro-choice groups have recommended that we release the final rule as quickly as possible. As the Administration finalizes the language of the rule, we are considering a number of options:

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Adding this language from the guidance would strengthen the rule and make it harder for a future administration to define nondirective options counseling in such a way that excludes abortion. The pro-choice groups believe strongly that defining nondirective counseling is an important

change to make, even though it means that the rule is no longer a clean revocation. They recommend that we otherwise stick closely to the pre-gag rule language so as not to engender a Congressional backlash or open it up to a legal challenge. (Thus, they counsel against bringing in other controversial language from the guidance such as language regarding referrals). Although we can expect a legal challenge regardless of the language, we hope to avoid a serious legislative challenge. (Congressman Bliley has introduced H.R. 2511, the "Adoption Awareness Act," which would promote adoption counseling and redefine nondirective counseling to exclude abortion. This bill, and Labor-HHS appropriations, would seem the likely vehicles for such an attack.)

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Legislative affairs is not aware that the gag rule is on anyone's radar screen, but they expect that anti-choice members may want to make an issue of it. However, in this political climate, the Republicans may be more inclined to make other abortion issues the focus of the anti-choice debate this summer and fall (such as "partial birth" and the Child Custody Protection Act).

Recommendation

I believe this is an important opportunity to strengthen Title X and recommend Option 2, inclusion of the nondirective counseling language. Although I share the concern of HHS and the Counsel's office, I believe we may face a legislative response regardless of the language, and therefore I recommend we issue a strong rule and get credit for doing so. I recommend against the addition of "promote or encourage" because it is a step back from the rule proposed in 1993 and it is not clear that it would buy us anything.