

GAG RULES—ENEMIES OF PUBLIC HEALTH AT HOME AND ABROAD: THE GLOBAL GAG RULE AND PROPOSED DOMESTIC GAG RULE COMPARED

MAY 2018

	GLOBAL GAG RULE	DOMESTIC GAG RULE (PROPOSED)
HOW POLICY PROMULGATED	Presidential Memorandum—January 23, 2017	Notice of Proposed Rulemaking posted online by the Department of Health and Human Services—May 22, 2018
EFFECTIVE DATE OF THE RESTRICTIONS	In force as of May 15, 2017 with issuance of “ Standard Provisions ” to be included in the grants and cooperative agreements of recipient organizations	To be determined— <ul style="list-style-type: none"> Proposed rule subject to a 60-day public comment period upon official publication, followed by an agency rulemaking process and publication of a final rule; Most provisions of the rule would be in effect 60 days after publication of a final rule with a one-year implementation period for the proposed rule’s “physical and financial separation” requirement; and Litigation may further delay implementation and enforcement.
U.S. GOVERNMENT (USG)-FUNDED PROGRAMS TO WHICH THE RESTRICTIONS APPLY	“Global health assistance furnished by all departments and agencies”	“Grants . . . to assist in the establishment of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children”
IMPACTED PROGRAM BENEFICIARIES	Hundreds of millions of women, men, families and communities in low-income developing countries overseas	Four million low-income and marginalized women and their families in the United States
AFFECTED ORGANIZATIONS AND INSTITUTIONS	Non-U.S. nongovernmental organizations (NGOs), both nonprofit and for-profit Most notable foreign NGOs losing USG funding to date—Marie Stopes International and International Planned Parenthood Federation—but list expected to grow with the application of restrictions to all recipients of U.S. global health assistance	All recipients of Title X domestic family planning funding would be subject to the rule’s requirements and at risk of losing federal funds under the proposed regulation This includes U.S. nongovernmental organizations—such as Planned Parenthood affiliates and other nonprofit community health care clinics and providers—hospitals, and state and local health departments

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USG DEPARTMENTS AND AGENCIES IMPLEMENTING	<ul style="list-style-type: none"> • U.S. Agency for International Development (USAID) • State Department—including the President’s Emergency Plan for AIDS Relief (PEPFAR) • Department of Health and Human Services • Department of Defense 	<ul style="list-style-type: none"> • Department of Health and Human Services
STATUTORY AUTHORITY	<p>Foreign Assistance Act of 1961—the permanent foreign aid authorizing statute</p> <p>Provisions contained in the annual State Department, Foreign Operations, and Related Programs Appropriations Act</p>	<p>Title X of the Public Health Service Act, enacted 1970</p> <p>Provisions contained in the annual Labor, Health and Human Services, Education, and Related Agencies Appropriations Act</p>
TYPE OF RESTRICTION	Eligibility condition—organization is rendered ineligible for USG global health assistance if it engages in prohibited activities	Eligibility condition—a program or project is rendered ineligible for domestic family planning grants if it engages in prohibited activities
PROHIBITED ABORTION-RELATED ACTIVITIES	<ul style="list-style-type: none"> • Perform, counsel, refer, or advocate on abortion “as a method of family planning,” even if activities supported with non-U.S. funds • Provide “financial support to any other foreign nongovernmental organization that conducts such activities” 	<ul style="list-style-type: none"> • “[Federally funded family planning] project may not perform, promote, refer for, or support, abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion”
DEFINITION OF “ABORTION AS A METHOD OF FAMILY PLANNING”	<ul style="list-style-type: none"> • Defined as “when it is for the purpose of spacing births,” including, but not limited to, abortions “performed for the physical and mental health of the mother” and for “fetal abnormalities,” but does NOT include abortions performed in the cases of life endangerment, rape or incest • Post-abortion care allowed—“treatment of injuries or illnesses caused by legal or illegal abortions” 	<ul style="list-style-type: none"> • Not as specifically defined in the proposed domestic regulations but limited by the Hyde Amendment, which restricts the use of federal funds for abortion except “if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed” [Source: FY 2018 omnibus appropriations bill]
COUNSELING AND REFERRAL FOR ABORTION	<ul style="list-style-type: none"> • Permissible in cases of threat to the life of the woman, rape or incest • If abortion is legal in a recipient country for reasons broader than life endangerment, rape or incest, referral for abortion is severely restricted and permitted only if all four of the following conditions are met: <ul style="list-style-type: none"> • woman is already pregnant; • woman “clearly states that she has already decided” to have an abortion; • woman “specifically asks” where a legal abortion may be obtained, and 	<ul style="list-style-type: none"> • Referral for abortion by medical personnel in a federally funded family planning project would be similarly—and, in some ways, more—severely restricted

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<p>COUNSELING AND REFERRAL FOR ABORTION <i>continued</i></p>	<ul style="list-style-type: none"> health care provider has reason to believe that the country's medical ethics require providing a referral for a legal abortion 	<ul style="list-style-type: none"> "If asked, a medical doctor may provide a list of licensed, qualified, comprehensive health service providers (some, but not all, of which also provide abortion, in addition to comprehensive prenatal care), but only if a woman who is currently pregnant clearly states that she has already decided to have an abortion. This list is only to be provided to a woman who, of her own accord, makes such a request. The list shall not identify the providers who perform abortion as such. All other patients will be provided, upon request, a list of licensed, qualified, comprehensive health service providers (including providers of prenatal care) who do not provide abortion as a part of their services" A pregnant client "must be referred for appropriate prenatal and/or social services (such as prenatal care and delivery, infant care, foster care, or adoption), and shall be given assistance with setting up a referral appointment to optimize the health of the mother and unborn child" "[Federally funded family planning] project may not use prenatal, social service, emergency medical, or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning" Proposed regulation also lists six "examples" or scenarios that seek to clarify what may or may not be permissible with regard to counseling and referral
<p>LOBBYING OR ADVOCACY ON ABORTION</p>	<ul style="list-style-type: none"> Foreign NGOs receiving U.S. global health assistance may not lobby their government to legalize or to "continue the legality" of abortion in cases other than life endangerment, rape or incest Foreign NGOs may not conduct "a public education campaign . . . regarding the benefits and/or availability of abortion" 	<ul style="list-style-type: none"> Restrictions on "activities that encourage, promote or advocate for abortion," including "actions to assist women to obtain abortions or to increase the availability or accessibility of abortion for family planning purposes," are more detailed in the proposed domestic regulations, but unlike the Global Gag Rule, apply only to the use of project funds Prohibited actions using project funds include: <ul style="list-style-type: none"> "lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning"; "providing speakers or educators"; "attending events or conferences" to engage in lobbying; dues payment to an abortion advocacy group that does not "separately collect and segregate funds used for lobbying purposes";

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LOBBYING OR ADVOCACY ON ABORTION <i>continued</i>		<ul style="list-style-type: none"> engaging in litigation to increase availability of abortion “in any way as a method of family planning”; and “developing or disseminating in any way materials (including printed matter, audiovisual materials and web-based materials) advocating abortion as a method of family planning or otherwise promoting a favorable attitude toward abortion” Proposed regulation also lists eight “examples” or scenarios that seek to clarify what may or may not be permissible with regard to abortion advocacy or promotion
INDIVIDUAL VS. ORGANIZATIONAL ACTION	<ul style="list-style-type: none"> An individual associated with a foreign NGO subject to the policy may engage in activities in their private capacity that would be prohibited if carried out by the organization itself An individual may engage in such otherwise restricted activities as long as he or she is— <ul style="list-style-type: none"> “neither on duty nor acting on the organization’s premises”; the organization does not endorse or fund the action; and “reasonable steps” are taken to ensure that the individual does not “improperly represent” that he or she is acting on behalf of the organization 	<ul style="list-style-type: none"> Among the eight “examples” related to abortion advocacy or promotion are two with relevance to the question of individual vs. organizational action, specifically: <ul style="list-style-type: none"> employees of a federally funded project may “write their legislative representative in support of legislation” to expand legal access to abortion “in their personal capacities and using no project funds to do so”; project employee may speak before a legislative body in support of “abortion as a method of family planning” so long as it is “on her own time and at her own expense”

IMPORTANT EXPLANATORY NOTE

The chart above is intended to compare the abortion-related restrictions contained in the Trump-Pence administration’s expanded Global Gag Rule with the proposed new regulations on the Title X domestic family planning program, released by the Department of Health and Human Services (HHS) on May 22, 2018.

It is important to note that these new proposed HHS regulations are many months from being finalized and may be significantly revised during the agency rulemaking process before the publication of any final rule in the Federal Register.

The chart is not meant to be an inclusive summary of all of the elements of the proposed Domestic Gag Rule regulation on the Title X family planning program—only those provisions that have a direct counterpart in the Global Gag Rule, referred to by Trump-Pence administration as the Protecting Life in Global Health Assistance (PLGHA) policy.