Via Internet at http://www.regulations.gov and email ogha.os.@hhs.gov

Kathleen Sebelius, Secretary
U.S. Department of Health and Human Services
Office of Global Health Affairs
Hubert H. Humphrey Building
Room 639H
200 Independence Avenue SW
Washington, DC 20201

Comments on Office of Global Health Affairs; Regulation on the Organizational Integrity of Entities Implementing Leadership Act Programs and Activities, Notice of Proposed Rulemaking, 74 Fed. Reg. 61,096 November 23, 2009

Dear Secretary Sebelius:

Twenty-one leading humanitarian, public health, and human rights organizations submit these comments on the proposed regulation implementing the "anti-prostitution policy requirement," 22 U.S.C. § 7631(f), contained in the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 ("Leadership Act").

Introduction

Over the last seven years, the United States has made an unprecedented investment in fighting HIV/AIDS around the world. This year, the US approved almost \$6 billion to fund HIV/AIDS care, treatment and prevention programs in more than 100 countries. There is widespread recognition that we must scale up prevention programs if we are to arrest the further spread of HIV/AIDS.

The goal of prevention, however, is undermined by the Leadership Act's "pledge requirement," which requires recipients of funding to have a "policy opposing prostitution and sex trafficking." There are a range of opinions on the best approach to sex work and its legal status. We do not argue here about the legal or moral merits of any particular approach. Our objection to the pledge requirement is a matter of free speech – the pledge requirement shuts down healthy debate on a topic that is difficult, complicated, and affects millions of lives. It also compromises programs serving an extremely vulnerable population. We maintain that it is unconstitutional to enforce the

pledge requirement against US-based NGOs. Moreover, the proposed regulations are unworkable for foreign NGOs.

It is not uncommon for the government to decide how best to use tax-payer funds. But the pledge goes further. It limits the way that organizations can operate HIV prevention programs even with private money. The government has repeatedly asserted that the pledge binds how Leadership Act recipients speak with both government and private funds.

The Bush Administration originally found that the pledge requirement was unconstitutional as applied to US NGOs and, accordingly, prevented agencies from enforcing it against US NGOs. They reversed course in 2005 and a broad coalition of groups – including the Global Health Council and InterAction – sued the US government on First Amendment grounds to stop enforcement. The draft regulation makes no mention of this litigation even though a federal court has twice found the pledge and its implementation unconstitutional. Instead, the draft proposes an extremely burdensome scheme for US groups to exercise their free speech rights. Moreover, the proposed regulation continues to be so vague that affected NGOs do not know how to operate under it. The draft regulation is therefore deeply disappointing.

Our specific concerns appear below.

I. The Proposed Regulation continues to violate free speech guarantees.

The pledge forces NGOs to adopt as their own the US government's view on a hotly contested social issue. The draft regulation does not remedy this fundamental problem. There are many groups who have no position on prostitution. These organizations may be engaged in providing health care, finding a vaccine, or caring for orphans. The pledge requirement, however, forces them to have a position opposing prostitution if they want US funds. Under the current scheme, those who refuse to "oppose prostitution" because they have no position on the issue and wish to remain neutral lose funding.

While the proposed regulation eliminates the requirement of a separate certification, it retains the mandate that recipients "agree that [they are] opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children." The District Court held that a mandate to espouse the government's preferred message violates the First Amendment. After the promulgation of affiliate guidelines, the District Court again held that the pledge requirement continued to violate the constitution because the guidelines did not alter the compelled speech requirement.²

¹ See AOSI v. USAID, 430 F. Supp. 2d 222, 274 (S.D.N.Y. 2006). ² See AOSI v. USAID, 570 F.Supp.2d 533, 545-46 (S.D.N.Y. 2008) ([b]ecause the Guidelines do not alter the compelled speech provision of the Policy Requirement ... the provision unconstitutionally compels speech").

In order to cure the ongoing constitutional violation, HHS should refrain again from enforcing the policy requirement against U.S.-based non-governmental organizations, as it did from May 2003 through May 2005, and as it has been substantially ordered to do by the District Court.³

II. The Proposed Regulation fails to define what it means to "oppose prostitution."

Organizations have repeatedly asked for clarification about what it means to "oppose prostitution." Because the pledge requirement extends to privately funded programs, it is especially important that the government clarify which programs, activities and speech are restricted. The regulation proposes an affiliation scheme, so that groups purportedly have an avenue to undertake restricted activities, but provides no guidance about when it is necessary to establish an affiliate.

There is a wide range of interventions, some of which have been the subject of criticism by select Members of Congress. Offering health care services appears to be acceptable, but broader interventions that address questions of safety, rights and an enabling environment may or may not be allowable. Experience and evidence have shown that interventions that address underlying causes of vulnerability are effective at reducing HIV transmission. We believe it is possible to oppose prostitution and still engage in activities to reduce vulnerability to HIV. For example, some organizations that implemented projects with sex workers have engaged or may wish to engage in the following activities:

- Operating a "safe house" where meetings, counseling, and health services are provided for sex workers;
- Researching the pros and cons of various legal regimes and their impact on HIV transmission among sex workers;
- Advocating for reducing or eliminating criminal penalties against sex workers in order to encourage them to help identify traffickers or to address extortion of police; and
- Helping sex workers form collectives and unions in order to better protect themselves from police and community violence and abuse and enable them to access health services.

Without clarity from the agency on whether such activities are permissible, some NGOs have curtailed such activities with their private funds rather than risk being out of

³ The District Court's most recent decision preliminarily enjoins enforcement of the policy requirement against all the U.S.-based members of Global Health Council and InterAction, except for DKT International, which was a plaintiff in separate litigation. *AOSI v. USAID*, 570 F. Supp. 2d at 550.

compliance with the pledge requirement even though these activities can contribute to reducing vulnerabilities and thus HIV transmission.

Funding recipients maintain numerous relationships with third parties including sub-grantees, coalition partners, academics and academic institutions, and organizations that collaborate in public health interventions. Because the proposed regulation mandates separation between a recipient and "affiliated organization," it is not clear what recipients must do to ensure that these organizations are sufficiently opposed to prostitution. This is an unprecedented expansion into the First Amendment-protected freedoms of expression and association of recipients and of other, non-recipient, organizations that have no business with the government.

Must recipients scrutinize the activities and speech of all the NGOs with which they work in order to ensure that none may cause the recipient to violate the regulation? For example, might grantees run afoul of the regulation if they locate their offices in the same building as or share employees with an NGO that organizes prostitutes to advocate for better working conditions and reduced law enforcement harassment?

The draft regulation may even prevent grantees from engaging in some of the affiliations in which they were expressly permitted and even encouraged to engage before the December 24, 2008 version of the regulation took effect. For example, previously, U.S.-based grantees could work with indigenous organizations, and, so long as those organizations were legally separate, grantees did not have to worry that the organizations' activities would be imputed to them in any way.

III. The separation requirements are unworkable.

Funding recipients must maintain "objective integrity and independence from any affiliated organization" that engages in undefined "restricted" activities. A recipient must be "to the extent practicable in the circumstances, legally, physically and financially separate from the affiliated organization." Rather than listing clear standards, there are five non-exclusive factors, none of which is given any particular weight. The agency reserves the right to determine, "on a case-by-case basis and based on the totality of the facts, whether sufficient legal, physical and financial separation exists" and reserves the right to take other, as yet undisclosed, factors into account.

The proposed regulation contains no process by which recipients may seek approval for affiliation proposals. Given the enormous financial and even criminal penalties that may flow from a violation of the policy requirement and regulation, the safest course for a recipient is to comply with each factor, and thus maintain the maximum level of separation between themselves and any affiliates.

At first glance, the proposed regulation appears less burdensome than the current regulation, because the proposed regulation removes several factors from its list of factors relevant to the determination whether sufficient separation exists. However, the proposed regulation is just as burdensome as the current regulation, because the agency

reserves the right to take all relevant factors into account, whether or not they are explicitly listed in the regulation.

Such a harsh separation requirement is unnecessary, and has been rejected by HHS in other arenas. In regulations for the faith-based initiative, HHS required that federally funded activities are conducted either at a different time or in a different place than any privately funded, religious activities such as worship and proselytization. HHS has recognized that this level of separation is sufficient to ensure that the government neither funds nor endorses a grantee's message. Therefore, such separation would be sufficient to ensure that HHS does not endorse any privately funded speech related to prostitution by recipients.

We note three specific concerns with regard to programs operating internationally.

1. The legal separation factor imposes excessive burdens on NGOs that operate in the developing world

Separation requirements in the proposed regulation pose particular challenges in the international context. NGOs that operate in the developing world must navigate cumbersome and often hostile regulatory regimes in multiple countries in order to be able to establish legally separate affiliates, a process that can be prohibitively long and expensive. As the State Department has documented, registration requests in developing countries are often denied and the process can be prohibitively long, expensive and cumbersome. ⁶ There is no guarantee that a new, separate entity will even be allowed to

⁴ See 69 Fed. Reg. 42,586(July 16, 2004). See also Executive Order No. 13279; White House Office of Faith-Based & Community Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government (2002), available at http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf.

The commenters take no position here on the Faith-Based Initiative or whether it enables the government to fulfill its constitutional obligations.

⁵ The Senate Appropriations Committee has also taken this position. *See* S. Rep. No. 110-128, at 33 (2007) (Senate Appropriations Committee "will view unfavorably any requirements that impose more costly and burdensome restrictions than those that apply to faith-based grantees.")

⁶ See, e.g., Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, Country Report on Human Rights Practices in Tajikistan – 2006, § 2(b) (2007), available at http://www.state.gov/g/drl/rls/hrrpt/2006/78843.htm. ("All NGOs must register with the [Ministry of Justice]. International NGOs, particularly ones supported by Western donors and involved in democracy-building activities, face[] registration problems from the government . . ."). See also David Moore, Safeguarding Civil Society in Politically Complex Environments, 9:3 International Journal of Not-for-Profit Law (July 2007), available at www.ijnl.org; International Federation of Red Cross and Red Crescent Societies (IFRC), Losk Study (2007), at 13, available at http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-

operate in a particular country. In certain cases, a request to register a new, related entity may prompt a national government to become suspicious of, and even question or revoke the hard-won, tax-exempt status of, an existing grantee organization.

2. The separate personnel and facilities factors force NGOs to surmount undue financial and logistical obstacles.

Recipients must also duplicate domestic headquarters staff and field office staff in multiple countries in the developing world. In many countries, the pool of people with such experience is extremely limited. Organizations that choose to hire United States expatriates or nationals of another country must then secure work permits and visas from local authorities. Substantial waiting times and approval procedures are routine. The requirement to set up physically separate offices is also unworkable, particularly given the government approvals required and lack of infrastructure in many developing countries.

3. Newly-formed affiliates will be unable to raise funds.

Finally, the newly formed affiliate will face significant challenges raising funds. The newly formed affiliate organization will have no track record of past performance and experience. Because the newly formed affiliate must operate with different personnel, it cannot rely on the track record of the original entity. Conversely, if organizations choose to transfer Leadership Act funds to an affiliate, it faces additional hurdles. USAID, for example, bars non-profits from registering as private voluntary organizations (as they must do to get funded) until they have been incorporated for at least 18 months.

In conclusion, we do not believe that the pledge should be enforced against US-based NGOs because it is an unconstitutional limitation on free speech. We also maintain that the proposed regulations are unworkable, both because they fail to answer basic questions about what is required and they propose a budensome affiliation scheme. The US government has proposed far less burdensome separation requirements in other arenas. Thank you for consideration of our comments.

Sincerely,

AIDS Foundation of Chicago American Jewish World Service CARE The Centre for Development and Population Activities (CEDPA) Community HIV/AIDS Mobilization Project DKT International

<u>78PH4N/\$file/ifrc-06nov.pdf?openelement</u> (describing inability of many humanitarian organizations to obtain registration in Thailand in wake of 2004 tsunami).

EngenderHealth

Global AIDS Alliance

Guttmacher Institute

Health GAP (Global Access Project)

IntraHealth International, Inc.

International Labor Rights Fund

International Planned Parenthood Federation

International Rescue Committee

International Women's Health Coalition

Ipas – USA

Partners in Health

PATH

Physicians for Human Rights

Population Action International

Population Services International (PSI)