



Michael O. Leavitt, Secretary
U.S. Department of Health and Human Services
Office of Global Health Affairs
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,
73 Fed. Reg. 20,900
April 19, 2008

Dear Secretary Leavitt,

OMB Watch, a nonprofit organization that promotes government accountability and civic participation, is submitting comments on proposed Leadership Act regulations because of our long standing interest in promoting a strong civil society where nongovernmental organizations (NGOs) actively inform and participate in public policy debates. The proposed rule, implementing the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"),¹ would require "legal, financial, and organizational" separation between a grantee and any affiliate organization that does not adopt mandatory language opposing prostitution and sex trafficking.

Because of our commitment to strengthening the voice of the nonprofit sector in public policy debates we fully support the right of all nonprofits to use their non-governmental resources to speak out on the moral and political issues of the day, regardless of their status as federal grantees.

Our work in the area of government grant rules goes back to 1983, when OMB Watch was formed. A proposed rule in OMB Circular A-122 would have prohibited federal reimbursement for all costs of broadly defined "political advocacy." It would have applied to any staff, equipment, or facility involved in any political advocacy, even if the advocacy costs were entirely paid with non-federal funds. A coalition of nonprofits successfully opposed this rule, resulting in the principle still at work today: federal funds cannot be used for lobbying, but grantees can use their private funds for that purpose.

¹ Public Law No. 108-25 (May 27, 2003)

We believe the proposed rule for NGOs receiving funds under the Leadership Act similarly violates basic principles of free speech and the independence of American civil society. It is so overbroad that it would turn private, nongovernmental organizations into mouthpieces of government by imposing policy statements governing all activities, including those not funded by the federal government.

NGOs are an important element of any democratic system. They are part of civil society, which "refers essentially to the so-called "intermediary institutions" such as professional associations, religious groups, labor unions, citizen advocacy organizations, that give voice to various sectors of society and enrich public participation in democracies."²

NGOs cannot fulfill this important role in society if partnerships with government are used to control speech and activities that are outside of partnership activities. However sympathetic and reasonable the Leadership Act's requirement for a government dictated policy may sound, it strikes at the fundamental independence of civil society. The issue is not whether prostitution and sex trafficking are abhorrent and should be eliminated: of course they should. The issue is whether government can use its grants to control private speech of citizens associating together to carry out a public interest mission.

Several NGOs, including the Alliance for Open Society International (AOSI), have challenged the constitutionality of this requirement in the federal courts.³ The proposed rule appears to be an attempt to derail the litigation by putting forth a false outlet for organizations desiring to protect their independence by not adopting the mandatory policy. Our reasons for finding this proposed "affiliation" rule to be a false outlet are explained below.

Recommendation

Because of our concerns we urge the Department to either:

1. Withdraw the rule and allow the courts to decide the issue on the merits, or
2. Re-write the rule based on the superior framework provided by regulations and guidance adopted for the faith-based initiative.

Regulations and Guidance for Faith-Based Organizations Provide a Better Standard

In addition to Department regulations adopted governing grants to faith-based organizations,⁴ the terms of a February 2006 settlement reached in *American Civil Liberties Union of Massachusetts v. HHS*,⁵ provide practical and reasonable steps to assure that public can perceive the difference

² Civil Society International, at <http://www.civilsoc.org/whatisCS.htm>

³ *Alliance for Open Society International, Inc, et. al v. United States Agency for International Development*, United States District Court, Southern District of New York, 05 Civ. 8209 (VM) (DF)

⁴ For a list see <http://www.ombwatch.org/article/articleview/1840/1/47/>

⁵ Settlement Agreement, *American Civil Liberties Union of Massachusetts v. Michael Leavitt, Secretary, U.S. Dept. of Health and Human Services, Wade Horn, Assistant Secretary for Children and Families, and Harry Wilson, Associate Commissioner for Children, Youth and Families* United States District Court for the District of Massachusetts, Civ. A. No. 05-11000 (JTL) Online at <http://www.aclu.org/pdfs/srtsettlementagreement.pdf>

between government funded activity and privately funded programs. In that case HHS agreed to withhold a \$75,000 grant to Silver Ring Thing (SRT), a Pennsylvania-based nonprofit that runs faith-based sexual abstinence education programs for teens across the country, until it took six steps separate government-funded activities from religious activities. The steps are:

- *Separate and Distinct Programs:* There must be separate and distinct programs for religious and secular instructions and teachings, and the distinction must be clear to the consumer. This could be achieved by creating different and distinct names and promotional materials, and promoting only the federally funded parts of the programs with federal money.
- *Separate Presentations:* Presentations must be separated by time or location. The presentation could be held in "completely different sites or on completely different days." HHS clarified that if the programs are held on the same site but at different times, there should be sufficient time to end one program before the other begins, and participants should be dismissed from one program before beginning another. If the programs are held at the same time but at different locations on the same site, there should be separate registrations, and separate rooms should be divided by floors or hallways.
- *Religious Materials:* Eliminate all materials with religious content from the federally funded abstinence program.
- *Cost Allocation:* Federal money is only to be used for federal programs. This should be demonstrated using time sheets to tally staff hours, particularly when employees work in both the religious and secular programs. If employees work on both programs on the same day at the same site, they must clearly account for their hours worked in each program. Cost allocation should be shown for all staff time, equipment and travel. For example, if secular and religious traveling programs are presented at the same site on the same day, the costs must be split between federal and private money.
- *Advertisements:* Federally funded programs cannot advertise the grant program services only to religious target populations.
- *Invitation to Religious Program:* At the end of a federally-funded program, participants may be invited to attend another religious abstinence education program. But the invitation must be "brief and non-coercive" and make clear that it is a separate and voluntary program.

This guidance drew praise from experts such as Ira C. Lupu and Robert W. Tuttle, Co-Directors of Legal Research for the Roundtable on Religion and Social Welfare Policy and Professors of Law, George Washington University Law School, who said, "we think that HHS's Settlement Agreement in *ACLU v. Leavitt*, and more specifically the Safeguards document incorporated in

the agreement, represents a significant legal development within the Bush Administration's Faith-Based and Community Initiative (FBCI)."⁶

This approach is also consistent with the request of four members of Congress, who wrote to the United States Agency for International Development (USAID) in July 2007, raising questions about the guidance the proposed rule is based on. They noted that "Groups working to address the causes and consequences of prostitution are concerned that the pledge requirement increases stigmatization and hinders outreach; and there is international public health consensus that effective outreach to marginalized populations is crucial to HIV prevention" Noting that the separation requirement would require legally and physically separate affiliates, the members said, "Less restrictive frameworks – such as those the Administration has endorsed and applied to faith-based groups – are available."⁷

The Department should heed this advice.

The Proposed Rule Cannot be Constitutionally Applied to Nongovernmental Organization/Grantees

The legal rationale behind the proposed rule is flawed.

In the Supplemental Information accompanying the proposed rule, HHS says the "criteria for affiliate independence are modeled on criteria upheld as facially constitutional by the U.S. Court of Appeals for the Second Circuit in *Velasquez v. Legal Services Corp.*" This is an overly broad application of that decision, since the legal services restrictions applied to a wholly different, domestic context and the case is still pending on reconsideration in the District Court.

In addition, the burdens imposed by the proposed rule exceed those imposed on the legal services grantees in *Velasquez*. For example, the proposed rule requires separate governance, personnel, physical facilities, equipment and financial accounting. These burdens are heavy if not insurmountable, and have no direct bearing on the government's legitimate aim as recognized in *Rust v. Sullivan*:⁸ to prevent the public from confusing government funded programs from privately funded ones. Unlike the proposed organization wide policy requirement, in *Rust* the Supreme Court said, "The regulations do not force the Title X grantee, or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from the activities of the Title X project." The court went on to say, "The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities."

⁶ Analysis, *ACLU of Massachusetts v. Leavitt U.S. District Court, District of Massachusetts*
Publication Date: 03/07/2006 Online at
http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=44

⁷ July 20, 2007 letter to Henrietta Fore, Acting Administrator, USAID, from Rep. Henry Waxman, Chair, Committee on Oversight and Reform, Rep. Tom Lantos, Chair, Committee on Foreign Relations, Rep. Donald Payne, Chair, Committee on Foreign Affairs, Subcommittee on Africa and Global Health, and Rep. Barbara Lee (TX)

⁸ 500 U.S. 173 May 23, 1991

The rationale for the proposed rule is based on court decisions, including *Rust*, that allowed speech restrictions that were otherwise constitutionally questionable, because the organizations involved had the option of creating separate affiliates or programs to carry out the restricted activity. The first case to use this principle was *Regan v. Taxation With Representation of Washington*⁹ (*TWR*), decided in 1983. A concurring opinion by three Justices said the restriction on the amount of lobbying by 501(c)(3) organizations is only justified by their ability to create 501(c)(4) affiliates to carry out additional lobbying activities. The concurring opinion notes that the separation required by the Internal Revenue Service (IRS) is limited to what is necessary to prevent tax deductible dollars going to charities for substantial lobbying. It goes on to note that, "Any restriction on this channel of communication, however, would negate the saving effect of Sec. 501(c)(4). It must be remembered that 501(c)(3) organizations retain their constitutional right to speak and to petition the Government."

In *DKT International v. USAID*, a 2007 case involving the same Leadership Act and pledge requirement, the United States Court of Appeals for the District of Columbia, citing both *TWR* and *Rust*, held that "Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution. As the government stated at oral argument, the subsidiary would qualify for government funds as long as the two organizations' activities were kept sufficiently separate. The parent organization need not adopt the policy."¹⁰ This clearly contemplates an arrangement where the separation is focused on program activities that can be perceived by the public, and allows for organizational overlap and sharing. The court may have ruled differently if the proposed rule had been before it.

The proposed affiliate requirement violates the spirit of these holdings by making real affiliation impossible, since the degree of separation required is so great that no affiliation in the normal legal sense could be achieved. This is inconsistent with the spirit of the holdings in *TWR*, *Rust* and *DKT* as well as several definitions of affiliation. For example, the Internal Revenue regulations governing lobbying by 501(c)(3) organizations provide that two groups are affiliated only if:

- (A) the governing instrument of one such organization requires it to be bound by decisions of the other organization on legislative issues, or
- (B) the governing board of one such organization includes persons who -
 - (i) are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and
 - (ii) by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.¹¹

The proposed rule would not allow such a close relationship. Similarly, the Small Business Administration regulation¹² determines affiliation as follows:

⁹ 461 U.S. 540 (1983)

¹⁰ *DKT International, Inc. v. United States Agency for International Development*, No. 06-5225, Decided Feb. 27, 2007

¹¹ 26 CFR 56.4911-7

¹² 3CFR121.103

"(a) General Principles of Affiliation. (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(6) In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit."

The rule is impractical to implement and contrary to program goals

The Global Health Council and InterAction, two large, well respected international aid organizations, have filed a petition in the United States District Court for the Southern District of New York seeking to join with AOSI in its legal challenge to the pledge requirement. They cite numerous barriers to implementation, particularly given the practical circumstances surrounding operations outside the United States. For instance, it is often difficult or impossible for new organizations to register in foreign countries in a timely way. For groups like CARE, which operates in 35 countries, the requirement is not realistic.

The petition cites the dilemma of CARE, which belongs to both groups, and "has been recognized by UNAIDS and the World Health Organization as a best practice leader in preventing HIV/AIDS for its sex worker peer education program in Bangladesh. Yet, the Policy Requirement has threatened this work, as well as similar work in India, and has forced CARE to refrain from sharing the lessons of its highly effective HIV prevention strategies at conferences and in public communications."¹³

When Congress passed the Leadership Act it found that NGOs are "critical to the success" in HIV/AIDS prevention.¹⁴ The proposed rule will undermine that success by forcing NGOs to choose between giving up their independence from government by adopting the required policy, or diverting significant time and resources attempting to meet the overly broad separation requirements.

¹³ Gayle Declaration, Paragraphs 23-24

¹⁴ 22 U.S.C. Sec. 7621(a)(4)

Impermissible vagueness results in inconsistency, politicization

The extreme vagueness of the rule, combined with broad proposed powers to enforce them on a case-by-case basis, leaves grantees open to inconsistent enforcement action at best, and political retribution at worst. Use of federal grant funds to pressure private speech of grantees is not unheard of. For example, in 2004 Advocates for Youth was the target of three Department of Health and Human Services audits in one year and had their funding cut after the organization criticized the administration's abstinence-only policies. James Wagoner, the group's president, "Never have we experienced a climate of intimidation and censorship as we have today. For 20 years, it was about health and science, and now we have a political ideological approach."¹⁵

Congress has consistently rejected legislative proposals to control private speech of nongovernmental organization/grantees.

Use of federal grant funds to control speech about the issues of the day has been proposed and consistently rejected several times in Congress over the past two decades. For example:

- In 1995 Rep. Ernest Istook (R-OK) and former Reps. David McIntosh (R-IN) and Robert Ehrlich (R-MD) proposed restrictions on federal grantees such that would have prohibited use of private funds for "political advocacy," a term that was very broadly defined. The Istook amendments were defeated after thousands of nonprofits across the country joined in a coalition, Let America Speak, to stop them.
- In 2003 Rep. Michael Castle (R-DE) introduced legislation reauthorizing the Individuals with Disabilities Education Act (H.R. 1350), a law that requires the education of children with disabilities. A provision that would have prohibited all advocacy by parent center grantees, even when that advocacy is paid for with private funds, was buried in the bill under a section that authorizes grants to parent and community training and information centers. The provision was dropped before the bill reached the House floor for a vote, following widespread opposition from nonprofits.
- In 2005 the Housing Finance Reform Act, which would have increased regulation of federal mortgage entities, passed the House despite a provision offered sponsored by Rep. Michael Oxley (R-OH) that would have disqualified nonprofits from receiving affordable housing grants if they engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications" up to 12 months prior to their application. These activities would have been barred during the grant period even if paid for with non-federal funds. Most troubling, affiliation with an entity that has engaged in any of the restricted activities would have disqualified a nonprofit from receiving affordable housing funds under the bill. After nonprofits campaigned against the provision the bill stalled in the Senate, and passed without the advocacy restrictions the following year.

¹⁵ Death by a Thousand Cuts II <http://www.ombwatch.org/npadv/PDF/death2-final.pdf> 2004

Conclusion

The Department has an obligation to interpret the Leadership Act in a manner most likely to protect its constitutionality. The current rule does just the opposite. Instead, the Department should re-write the rule according to its guidance in the Silver Ring Thing case, or withdraw it altogether and allow the courts to decide the constitutionality of the pledge requirement.

Yours truly,

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