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Via Internet at http://www.regulations.gov and email to 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:

On behalf of six leading humanitarian, public health, and advocacy organizations, the Brennan Center for Justice at NYU School of Law submits 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").

Commenters

These comments are submitted on behalf of Alliance for Open Society International, Inc., Pathfinder International ("Pathfinder"), the Open Society Institute, InterAction, and Global Health Council, all of which are plaintiffs in ongoing litigation in which the policy requirement and its implementation twice have been found to violate the First Amendment. *Alliance for Open Soc'y Int'l v. USAID*, 570 F. Supp. 2d 533

(S.D.N.Y. 2008), *appeal docketed*, No. 08-4917-cv (2d Cir. Oct. 6, 2008); *Alliance for Open Soc'y Int'l v. USAID*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) [hereinafter "*AOSI*"]. Alliance for Open Society International and Pathfinder have carried out HIV/AIDS prevention programs with Leadership Act funds. InterAction is the largest alliance of U.S.-based international development and humanitarian non-governmental organizations ("NGOs"). Global Health Council ("GHC") is a nonprofit membership alliance of organizations dedicated to international public health. Both InterAction and GHC count among their members numerous recipients of Leadership Act funds.

Finally, these comments are submitted on behalf of the Brennan Center itself. The Brennan Center represents the plaintiffs in the *AOSI* lawsuit and is a national expert on the free speech rights of non-profit organizations that partner with government.

Introduction

When first faced with the anti-prostitution policy requirement's unconstitutional mandate in 2004, HHS responded in the only appropriate way: it refrained from enforcing the requirement against U.S. groups, based on Department of Justice advice that such enforcement would be unconstitutional. This approach, taken under the Bush Administration but later reversed, remains the only way to implement the statute without running afoul of the First Amendment.[1]

However, instead of reviving the original Bush Administration position, the Notice of Proposed Rulemaking ("NPRM") continues to apply the policy requirement in an unconstitutional manner, ties major HIV/AIDS prevention efforts in knots, and is guaranteed to cost lives and waste money. The NPRM has disregarded the *AOSI* decisions and was issued without any opportunity for input by the *AOSI* plaintiffs, even though the proposed regulation presumably seeks to resolve the litigation.

This NPRM marks the fourth time that HHS has tinkered with the policy requirement's implementation since it began its unconstitutional enforcement against U.S. groups in 2005. However, HHS has not even sought to rectify the fundamental constitutional flaw: the mandate that independent NGOs espouse as their own the government's viewpoint on prostitution. HHS has perpetuated this unconstitutional implementation in the face of two federal district court rulings that have enjoined enforcement of the policy requirement on this and other First Amendment grounds. Indeed, the *AOSI* decisions are not even mentioned in the NPRM.

In addition, the proposed regulation fails to respond in a meaningful way to the many specific concerns—both about the burdens on NGOs operating in the developing

[1] HHS also persists in concealing the Department of Justice legal analysis that presumably admitted that the policy requirement cannot be constitutionally enforced against domestic nonprofits. That legal opinion is the subject of a pending Freedom of Information Act lawsuit in federal district court. *Brennan Center for Justice v. Department of Justice*, No. 09-CV-8756 (S.D.N.Y. filed Oct. 15, 2009).

world and the difficulty in complying with such vague standards— identified by affected organizations during the previous round of comments.

More specifically, the proposed regulation:

I. continues to compel speech in violation of the First Amendment;
II. fails to provide recipients clear notice of which activities must be conducted through a separate affiliate;
III. imposes standardless and discretionary separation requirements that fail to provide grantees with sufficient notice as to how separate any "restricted" activities must be;
IV. continues to impose separation requirements so burdensome that recipients will not be able to set up affiliates;
V. violates Congressional intent to promote efficiency in foreign aid and public-private partnerships in the delivery of HIV/AIDS services; and
VI. contradicts HHS's own acknowledgment in the context of the faith-based initiative that separation requirements of the sort it imposes here are excessive.

I. The Proposed Regulation Does Not Cure the Unconstitutional Requirement That Independent Organizations Espouse the Government's Viewpoint.

The regulation does not remedy the central constitutional problem with the policy requirement: its mandate that independent, non-profit organizations adopt the government's viewpoint on prostitution in order to be eligible to receive HIV/AIDS funds. While the NPRM eliminates the requirement of a separate certification regarding compliance with the regulation, 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." 74 Fed. Reg. 61,098. The NPRM does not offer any rationale to explain how the continued requirement that NGOs agree that they oppose prostitution complies with the District Court's holding that a mandate to espouse the government's preferred message violates the First Amendment. *See AOSI v. USAID*, 430 F. Supp. 2d 222, 274 (S.D.N.Y. 2006) (holding that the requirement that "Plaintiffs . . . adopt a policy espousing the government's preferred message" improperly compels speech in violation of the First Amendment). Nor does the NPRM offer any rationale to explain how it complies with the District Court's second ruling, issued after the promulgation of affiliate guidelines, which held that the policy requirement continued to violate the constitution because the guidelines did not alter the compelled speech requirement. *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 ordered to do by the District Court.[2]

II. The Proposed Regulation Fails to Define the Most Basic Terms and Therefore Exacerbates the Unconstitutional Vagueness of the Policy Requirement.

The NPRM leaves intact the existing "Definitions" section of the regulation, 45 C.F.R. § 89.1, which fails to define the most critical terms. As a result, recipients remain in the untenable position of not knowing whether privately funded interventions with sex workers are "restricted" such that they must be performed through a separate affiliate. At the same time, the continued failure to define "affiliated organization" calls into question all relationships that recipients maintain with third parties including grantees, coalition partners, and organizations and governmental entities that collaborate in public health interventions.

The proposed regulation therefore fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and to "provide explicit standards for those who apply them," as the Constitution requires. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (striking down a permit requirement that delegated "overly broad licensing discretion to a government official"). HHS has failed to provide this needed clarity even though it received multiple comments in its prior rulemaking process urging the adoption of clear standards.

a. The proposed regulation is impermissibly vague because it fails to define "activities inconsistent with the recipient's opposition to prostitution ...."

The proposed regulation requires recipients to maintain "objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children ['restricted activities']," 45 C.F.R. § 89.2. However, the proposed regulation, like the final regulation it amends, never states what those forbidden activities are. This vagueness places recipients in an untenable position. This failure stands in marked contrast to the Legal Services Corporation ("LSC") program integrity regulation on which this regulation purportedly is based, which spells out in great detail the activities that grantees are prohibited from engaging in, and which was promulgated under a statute that likewise

[2] 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 DKT International. *AOSI v. USAID*, 570 F. Supp. 2d at 550.

spelled out in great detail the prohibited activities. *See* 45 C.F.R. § 1610.2(b) (incorporating by reference statutory and regulatory definitions of prohibited activities).[3]

As a result, recipients do not know whether a number of common activities are "restricted" such that they must be performed out of a separate affiliate. Commenter Pathfinder, for example, does not know if the government views its privately funded HIV prevention program in India, which organizes prostitutes and does outreach to brothel owners to foster safer sex, as "restricted." The commenters also wish to know whether the following other common activities are considered restricted:

1. A recipient provides private funds to a group of sex workers that has come together as a collective to help them obtain access to such rights as wearing shoes outside a brothel and a proper burial. That group of sex workers either has no policy on prostitution or, on its own accord, takes a public position promoting or advocating the legalization of prostitution.

2. A recipient uses private grants to conducts trials on microbicides. These trials require the enrollment of individuals at very high risk of contracting HIV, such as sex workers, in order to evaluate the effectiveness of new products in preventing HIV transmission. Such trials must be carefully constructed to ensure that such women are not exploited as human subjects. Previous trials involving sex worker populations have been unsuccessful due to protests by sex worker groups (among others) over the perceived ethics of such trials. The recipient wants to work with this community in order to build bridges and help sex workers and their allies understand the potential of microbicides and prevention research. It also wants to contract with members of the community to conduct research and engage in outreach with their peers. The coalitions, NGOs and unions representing sex workers all take different positions on the issue of prostitution and its legalization.

b. The failure to define "affiliated organization" renders the proposed regulation impermissibly vague and subjects recipients to risk of sanction for routine relationships with third parties.

The proposed regulation fails to define "affiliated organizations" of recipients. Notably, the current version of the regulation applies to recipients' relationships with "any other organizations that do not have a policy opposing prostitution and sex trafficking, regardless of whether these other organizations are technically defined as 'affiliates' of the recipient." 73 Fed. Reg. 78,997, 78,999 (Dec. 24, 2008). While HHS proposed in April 2008 to bar relationships only with "affiliates" that lack a policy opposing prostitution, the final regulation issued in December 2008 omitted the term "affiliate" in response to a commenter's complaint that the term was vague and undefined. *Id.* It makes no sense to re-insert that term now without defining it.

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[3] Similarly, the failure to define restricted activities is out of step with HHS's program integrity regulation at issue in *Rust v. Sullivan*, which listed the forbidden activities that would be deemed to "encourage, promote or advocate abortion as a method of family planning." 500 U.S. 173, 180 (1991).

"Affiliate" is defined elsewhere by HHS and other federal agencies quite broadly. In the food and drug regulations, for example, HHS defines "[n]onprofit affiliate" as "any not-for-profit organization that is either associated with or a subsidiary of a charitable organization as defined in section 501(c)(3) of the Internal Revenue Code of 1954." 21 C.F.R. § 203.3(t). The failure to limit the term here has significant consequences for recipients.

Recipients will have to 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, grantees risk running 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.

Moreover, by failing to limit "affiliated organizations," the proposed regulation continues to restrict even more speech than does 22 U.S.C. § 7631(f), by subjecting recipients to risk of sanction for relationships with third parties. Every relationship with another organization is subject to potential scrutiny by the government, and may result in sanction. 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. The proposed 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 Multi-Factor Test for Legal, Physical and Financial Separation Fails to Provide Recipients with Clear Standards and Fails to Provide an Approval Process for Affiliate Relationships.

The proposed regulation requires recipients to maintain "objective integrity and independence from any affiliated organization" that engages in undefined "restricted" activities. In order to maintain objective integrity and independence, a recipient must be "to the extent practicable in the circumstances, legally, physically and financially separate from the affiliated organization." 45 C.F.R. § 89.2(a)(2).

Rather than listing clear standards for determining adequate legal, physical and financial separation, the regulation lists 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. Given the enormous financial and even criminal penalties that may flow from a violation of the policy requirement and regulation, the only safe course for a recipient is

to comply with each factor, and thus maintain the maximum level of separation between themselves and any affiliates.

The vagueness of the multi-factor test is exacerbated by the vagueness of several of the individual factors, which incorporate inherently vague terms such as "the extent to which" and "the degree of." *See* 45 C.F.R. §§ 89.3(a)(2)(iv) and (v). Recipients have no way of knowing with any of these factors how much is too much. As a result, they must comply with the broadest interpretation of each to avoid potential penalties. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991) (statute allowing attorney to describe at press conference the "general nature of the defense without elaboration" was problematic because "general" and "elaboration" "are both classic terms of degree" that do not provide sufficient guidance for determining whether conduct is unlawful).

Moreover, the proposed regulation contains no process by which recipients may seek approval for affiliation proposals. Even if there were such a process, without clear standards in the multi-factor test, recipients will either have to submit proposals containing maximum separation in order to ensure HHS's approval, or submit many different proposals with many different levels of separation in order to figure out the least burdensome configuration that would meet with HHS's approval. Either way, recipients will be forced to sacrifice First Amendment rights.

IV. The Legal, Physical and Financial Separation Requirements Continue to Impose Prohibitive Burdens on Recipients.

The separation requirements in the proposed regulation continue to impose insurmountable barriers to setting up affiliates in the international context. As is discussed above, the multi-factor test for adequate separation is so vague and indeterminate that recipients must sacrifice their First Amendment rights by maintaining the maximum level of separation between themselves and any other organizations engaged in work that poses a risk of sanction.

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 of 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. Moreover, the proposed regulation continues to include factors that are particularly burdensome because recipients "operate internationally in dozens of countries, many of them developing states still lacking administrative rules under which foreign entities may function effectively." *AOSI*, 570 F. Supp. 2d at 548. Accordingly, the proposed regulation continues to "require more separation than is reasonably necessary to satisfy the Government's legitimate interest … [and is] not narrowly tailored to achieve Congress's goals." *Id.* at 549.

a. The inclusion of legal separation as a factor is prohibitively burdensome in the international context and will harm the ability of recipients to raise funds.

The proposed regulation includes legal separation as a factor to be considered when evaluating whether a recipient is sufficiently separate from an affiliated organization that engages in restricted activities. The mere transfer of the requirement from a *per se* condition to a factor to be considered does not relieve recipients of the burden of setting up legally separate entities through which to engage in restricted work. Indeed, as is described *supra*, the only way for a recipient to ensure it has complied with the separation test is to comply with each and every factor. Thus, the burdens of legal separation under the old regulation persist.

Legal separation imposes particularly harsh burdens 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 affiliates, a process that can be prohibitively long and expensive.

1. The legal separation factor forces recipients to register new legal entities with multiple host countries in order to operate.

In most developing countries where Leadership Act recipients operate, all NGOs must register with and obtain the approval of the host country prior to operating. In order to establish a new, legally separate NGO, recipients will be required to secure a new registration for the new entity in multiple countries and explain to foreign government authorities – often multiple authorities at different levels – why such a structure is necessary. As the State Department has documented, registration requests in developing countries are often denied and the process can be prohibitively long, expensive and cumbersome.[4] Commenter Pathfinder International, for example, operates in 27 countries; Leadership Act grantee CARE, a member of GHC and InterAction, operates in over 35 countries. The registration process is burdensome and can result in outright denial of the request to operate a new entity. For example, in India and Bangladesh, where Pathfinder and CARE run privately funded HIV prevention programs targeting sex workers, the process for registering and establishing a new entity typically takes months or years and requires clearances from multiple government agencies, including

[4] *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) (Mar. 6, 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),* Law and Legal Issues in International Disaster Response: A Desk Study (2007), at 13, available at http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-78PH4N/$file/ifrc-06nov.pdf?openelement (describing inability of many humanitarian organizations to obtain registration in Thailand in wake of 2004 tsunami).

intelligence authorities. Past practice indicates that there is no guarantee that a new, separate entity will even be allowed to operate in either country.[5]

In addition, the challenge of registering new entities is compounded by myriad host country rules regarding tax-exempt status, which the new entity will have to navigate. 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 legal separation factor will harm recipients' ability to raise funds.

The inclusion of a legal separation factor will harm recipients' ability to raise funds. If the newly formed affiliate organization is to be privately funded, it will encounter problems attracting funding from the private sector due to the absence of a proven record of past performance and experience. Because of the extensive amount of separation required, the newly formed affiliate, operating with different personnel, cannot rely on the track record of the original entity. The affiliate would also be at a disadvantage in obtaining funding from other U.S. government sources. Indeed, it could not register with USAID as a "private voluntary organization," as it must do in order to obtain certain types of USAID funding, until it had been incorporated for at least 18 months. 22 C.F.R. § 203.3(f)(4).

On the other hand, if the newly formed entity is to receive Leadership Act funds, it will be at a disadvantage because it will not be able to point to its past performance, which HHS and other agencies must consider when evaluating grant applications. 22 U.S.C. § 2151u(a) (Foreign Assistance Act requires that the United States' foreign assistance programs should be carried out "by such private and voluntary organizations and cooperatives as have demonstrated a capacity to undertake effective development activities").

b. The separate personnel factor in 45 C.F.R. § 89.2(a)(2)(ii) continues to impose considerable costs and logistical barriers in the international context.

The continued inclusion of a separate personnel factor is particularly onerous because recipients operate in developing countries. In addition to duplicating domestic headquarters staff, itself a costly proposition, recipients would have to duplicate field office staff in multiple countries in the developing world. For the reasons described below, such duplication would be prohibitively expensive, burdensome, and time-consuming.

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[5] *See*, *e.g.*, Leon Irish, Karla Simon, and Fawzia Karim Feroze, Legal and Regulatory Environment for NGOs in Bangladesh at 10 (April 17, 2005), *available at* http://www.iccsl.org/pubs/bangladeshfinalreportmay15.pdf.

Recipients try to hire as country representatives and other personnel the people with the best experience both working in that particular country or region, and carrying out the particular types of programs that field office runs. In awarding grants, funders place great weight on the qualifications of the country representative and other key people running a program. For example, in evaluating commenter Pathfinder's application for a grant to do home-based care in Tanzania, the Centers for Disease Control and Prevention ("CDC") found it to be a strength that staff members were "local with a wide range of skills and a wealth of experience working with other United States Government (USG) partners and NGOs" and had "5-18 plus years of experience in the HIV/AIDS universe of OI/HIV/STD."[6] In many countries, the pool of people with such experience is extremely limited. For example, recipients often need senior staff with experience in how to prevent the spread of HIV/AIDS among particular populations, or in non-profit or governmental capacity-building. Finding one local person with such expertise is difficult. In many instances, finding two would be next to impossible.

Consequently, many country representatives and other professional staff are either United States expatriates or nationals of another country. In order to hire such staff, work permits and visas from local authorities must be obtained. The process often requires an NGO to hire a local attorney, advertise the position locally to see if any local applicants apply, and then demonstrate that none of the local applicants are qualified. Substantial waiting times and approval procedures are routine and, typically, entities to which such foreign individuals will be assigned must be fully registered and approved before visas can be issued. For example, in 2007, commenter Pathfinder was unable to obtain an Indian work permit for a Bangladeshi employee with extensive expertise in working to prevent HIV/AIDS transmission among men who have sex with men – expertise needed for that particular position.

In addition to the problems obtaining work permits and visas, hiring duplicate staff imposes myriad additional costs. NGOs generally provide non-citizen staff with housing, which is often quite expensive due to the limited availability of suitable housing stock in many developing countries. In many countries, electrical grids are unreliable, so NGOs must pay for generators for their employees' homes. Where necessary, NGOs also provide security for staff living overseas. Recipients also would face increased costs for bringing field office staff to the U.S. for trainings, strategy meetings, board meetings, or other events.

The addition of alternative language to the end of the separate personnel factor does not ameliorate these burdens. The new, proposed factor requires either separate personnel or "other allocation of personnel that maintains adequate separation of the activities of the affiliated organizations from the recipient." However, without knowing what "other allocation" or "adequate separation" mean, recipients will have to separate their personnel completely and thus incur all the burdens described above.

[6] Summary Statement, Program Announcement # 04208, Scale-Up of Home-Based Care Activities for People Living with HIV/AIDS in the United Republic of Tanzania, at 3, attached as Exhibit F to Declaration of Daniel E. Pellegrom, dated Feb. 7, 2008, *AOSI v. USAID*, 05-CV-8209 (S.D.N.Y.), available at http://brennan.3cdn.net/70b8710cc064927756_zvgm6u55l.pdf.

c. The proposed regulation's separate facilities factor, 45 C.F.R. § 89.2(iv), continues to be extremely onerous.

The continued inclusion of a separate facilities factor is also particularly onerous because recipients operate in developing countries. Some countries in which recipients operate require them to obtain government permission before opening a new office. In addition, opening a duplicate office requires securing appropriate office space as well as telephone and Internet access, a process that is likely to take months or longer. The opening of additional office space also can entail the installation of additional computer servers and the need to obtain additional insurance policies. All of these tasks are very difficult in the developing world.

V. The Separation Requirements Undermine Congressional Intent to Promote Efficiency and Public-Private Partnerships in Foreign Assistance.

As is described above, the creation of an affiliated organization that is legally separate, with duplicate personnel and facilities, is certain to result in significant expense and inefficiency for recipients. The resultant waste undercuts Congress's intent that Leadership Act funds and foreign assistance more generally be spent in the most efficient manner possible. *See* 22 U.S.C. § 2151b-2(d)(7)(B). *See also* 22 U.S.C. § 2151(a) (declaring that "development resources [should] be effectively and efficiently utilized" to meet federal development policy goals); S. Rep. No. 110-128, at 33 (2007) (Senate Appropriations Committee urging that separation guidelines implementing Policy Requirement be based on faith-based model "so as to avoid requirements that waste resources that could otherwise be used to save lives").

The duplication requirements also undercut the legislative policy of promoting public-private partnerships. Throughout the Leadership Act, Congress made clear its desire to conduct its fight against HIV/AIDS through independent non-profits. 22 U.S.C. § 2151-1(b)(8) ("United States cooperation in development should be carried out to the maximum extent possible through the private sector, including those institutions which already have ties in the developing areas, such as . . . private and voluntary agencies."). In the face of this Congressional desire, the proposed regulation makes it dangerous at best, and potentially illegal, for recipients to affiliate with, or even work in coordination with, other U.S. and indigenous NGOs. For example, recipients risk running afoul of the regulation if they locate their offices in the same building with, or share employees with an NGO that engages in advocacy deemed inconsistent with opposition to prostitution. Because the regulation does not define what that restricted advocacy is, recipients will have to shy away from associating with any entity that might endorse legal changes in the way prostitution is treated or better working conditions for prostitutes. They even risk running afoul of the regulation if they work in coalition with an organization that engages in the restricted activities to whatever degree the government determines to be too much. *See* 45 C.F.R. § 89.2(a)(2)(iv)(stating that "[f]actors relevant to the determination" of whether recipient is sufficiently separate from an affiliated organization include "the extent of such restricted activities by the affiliated organization").

VI. The Proposed Regulation's Harsh Burdens Contradict HHS's Previous Conclusion That Separation Requirements of the Sort Imposed Here Are Excessive.

In issuing its regulation implementing the faith-based initiative, HHS provided that NGOs may receive federal funds as long as they ensure that no federal funds are spent on inherently religious activities and 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.[7] 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 suffice to ensure that HHS does not endorse any privately funded speech related to prostitution by recipients.[8]

Indeed, when finalizing the separation requirements applicable to faith-based grantees, HHS rejected as too burdensome suggestions that federally funded social services and privately funded religious activities be performed by legally separate organizations and that more stringent physical separation be imposed between federally funded and religious activities. *See* 69 Fed. Reg. 42,586, 42,587-88, 42,591-92 (July 16, 2004).

HHS also warned of the burdens of requiring organizations to operate federally funded programs in separate facilities, stating:

> [A] prohibition on the use of religious icons would make it more difficult for many faith-based organizations to participate in Department programs than for other organizations by forcing them to procure additional space. It would thus be *an inappropriate and excessive restriction ….*

69 Fed. Reg. 42,588 (emphasis added).

HHS has previously defended the harsher treatment of speech related to HIV prevention among prostitutes by stating that "[t]he U.S. Government has found prostitution and sex trafficking to be degrading and harmful to those involved, and therefore a stronger separation standard is required than is established for faith-based organizations." 73 Fed. Reg.78,997, 78,999 (Dec. 24, 2008). In contrast, HHS has stated, the government must be neutral towards faith-based organizations. However the harsher treatment of prostitution-related speech amounts to nothing more than a "spite fence" designed to prevent the efficient expenditure of private funds on protected speech, an aim in which HHS cannot have a legitimate interest. *See*, *e.g.*, *Cullen v. Fliegner*, 18

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[7] *See* 69 Fed. Reg. 42,586 (July 16, 2004). *See also* Executive Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002). The commenters take no position here on the Faith-Based Initiative or whether it enables the government to fulfill its constitutional obligations.

[8] 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.")

F.3d 96, 104 (2d Cir. 1994) (government "cannot have a legitimate interest in discouraging the exercise of constitutional rights").

VII. Other Comments

a. The Regulatory Flexibility Act analysis contradicts HHS's previous findings about the burden of separation.

HHS's certification, under 5 U.S.C. § 605(b), that this rule will not result in a significant impact on a substantial number of small entities is erroneous in light of HHS's own statements regarding the impact that similar separation requirements would have on faith-based entities. *See* Section VI, *supra.* This conclusion also ignores the substantial evidence already in HHS's possession regarding the burdensome nature of the separation requirement.[9] And, it is contradicted by Section V of this submission. Moreover, the notice of proposed rulemaking fails to provide any factual basis for this conclusion, as required by 5 U.S.C. § 605(b). Accordingly, HHS should instead conduct the appropriate regulatory flexibility analysis required by 5 U.S.C. §§ 603, 604.

b. The findings under Executive Order 12866—Regulatory Planning and Review contradict HHS's previous findings about the burden of separation.

HHS's conclusion that "[t]he costs of the rule are minimal" is contradicted outright by HHS's conclusions regarding the impact that a separation requirement in the faith-based context would have on recipients. *See* Section VI, *supra*. It also ignores the substantial evidence already in HHS's possession regarding the burdensome nature of the separation requirement.[10] And, it is contradicted by Section IV of this submission.

Thank you for consideration of our comments.

Sincerely,

Rebekah Diller
Deputy Director, Justice Program

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[9] *See AOSI v. USAID*, 570 F. Supp. 2d 533, 548 (S.D.N.Y. 2008) (burdens of separation regulations increased because plaintiff associations "operate internationally in dozens of countries, many of them developing states still lacking administrative rules under which foreign entities may function effectively"). *See also* Memorandum in Support of Motion of Plaintiffs for Leave to File a Second Amended Complaint and Motion by Global Health Council and InterAction for a Preliminary Injunction dated Feb. 8, 2008 and Reply Memorandum in Support of Plaintiffs' Motion for Leave to File a Second Amended Complaint and Motion by Global Health Council and InterAction for a Preliminary Injunction dated April 7, 2008, *AOSI v. USAID,* No. 05 Civ. 8209 (S.D.N.Y.).

[10] *See id.*